MISSISSIPPI LAW JOURNAL

DE FACTO AND DE JURE SCHOOL SEGREGATION: SOME REFLECTED LIGHT ON THE FOURTEENTH AMENDMENT FROM THE CIVIL RIGHTS ACT OF 1875

Alfred Avins

SCHOOL SEGREGATION AND PROFESSOR AVINS' HISTORY: A DEFENSE OF BROWN V. BOARD OF EDUCATION

Walter E. Dellinger, III

ACCOMMODATION OF MISSISSIPPI CRIMINAL PROCEDURE TO THE EVOLVING CONCEPTS OF "CONSTITUTIONALIZED" DUE PROCESS–PART III

Parham H. Williams, Jr.

March 1967

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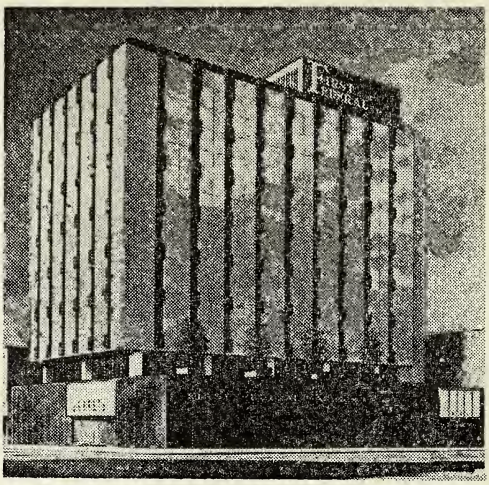

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DE FACTO AND DE JURE SCHOOL SEGREGATION: SOME REFLECTED LIGHT ON THE FOURTEENTH AMENDMENT FROM THE CIVIL RIGHTS ACT OF 1875.

*by Alfred Avins**

I. Introduction

More than ten years after *Brown v. Board of Educ.*[1] race relations and schools are still very much in the news. The continuing number of cases on de facto and de jure school segregation[2] has continued public interest in this area. A review of the original understanding of the framers of the fourteenth amendment as applied to school segregation is clearly appropriate at this time.

Ten years ago, an article reviewing the original intent as reflected in the debates on the fourteenth amendment itself concluded that direct light on the subject was quite scanty.[3] However, there is abundant reflected light from the debates on the proposed school clause of the bill which ultimately became the Civil Rights Act of 1875.[4] The fact that the school clause was ultimately stricken from the bill has no doubt discouraged research in this area. Yet the debates thereon are illuminating for the reflected light they cast on the intent of the fourteenth amendment as it relates to schools. This article will analyze that debate.

II. Sumner and the Amnesty Bill Amendment

On May 13, 1870, Senator Charles Sumner, the ultra-equalitarian

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[1]Brown v. Board of Educ., 347 U.S. 483 (1954).

[2]Many recent cases and articles are referred to in Dowell v. School Bd., 244 F. Supp. 971 (W.D. Okla. 1965).

[3]Bickel, *The Original Understanding and the Segregation Decision*, 69 Harv. L. Rev. 1, 56-59 (1959).

[4]18 Stat. 335 (1875).

Radical Republican from Massachusetts, introduced in the Senate a bill to supplement the Civil Rights Act of 1866.[5] The first section of this bill covered a variety of matters, including common carriers, inns, places of amusement, churches, cemeteries, and benevolent institutions. In pertinent part, it read as follows:

> That all citizens of the United States, without distinction of race, color or previous condition of servitude, are entitled to the equal and impartial enjoyment of any accommodation advantage, facility, or privilege furnished . . . by trustees, commissioners, superintendents, teachers, or other officers of common schools and other public institutions of learning, the same being supported or authorized by law . . . and this right shall not be denied or abridged on any pretense of race, color, or previous condition of servitude.[6]

The bill died after being sent to the Senate Judiciary Committee and reported adversely by its chairman, Senator Lyman Trumbull of Illinois, for the committee.[7] In the next session, Sumner once again introduced his bill,[8] and once more it was referred to the Judiciary Committee from which Trumbull reported it adversely, and again it died.[9] In both cases, the adverse report, although not written, was unanimous. Some members thought that Sumner's bill was unconstitutional, and others thought that it was unnecessary.[10] For a third time, in the First Session of the Forty-Second Congress, Sumner introduced his bill. Again no other senator evinced much interest, and again the bill expired of its own accord.[11]

In the face of these rebuffs, Sumner moved, in the next session of Congress, on December 20, 1871, to tack his proposal on as a rider to the Amnesty Bill, a proposal authorized by the third section of the fourteenth amendment to lift the remaining political disabilities imposed by that section on many prominent confederates.[12]

When Sumner declared that his bill was designed to secure "equal

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[5] 14 Stat. 27 (1866).

[6] CONG. GLOBE, 42d Cong., 2d Sess. 244 (1871). See also CONG. GLOBE, 41st Cong., 2d Sess. 3434 (1870); CONG. GLOBE, 42d Cong., 2d Sess. 821 (1872).

[7] CONG. GLOBE, 41st Cong., 2d Sess. 5314 (1870). See also CONG. GLOBE, 42d Cong., 2d Sess. 821 (1872).

[8] CONG. GLOBE, 41st Cong., 3d Sess. 616 (1871).

[9] *Id.* at 1263. See also CONG. GLOBE, 42d Cong., 2d Sess. 822 (1872).

[10] CONG. GLOBE, 42d Cong., 2d Sess. 493, 731 (1872).

[11] CONG. GLOBE, 42d Cong., 1st Sess. 21 (1871). See also CONG. GLOBE, 42d Cong., 2d Sess. 822 (1872).

[12] CONG. GLOBE, 42d Cong., 2d Sess. 237, 240 (1871). The political machinations over amnesty are described in Kelly, *The Congressional Controversy over School Segregation 1867-1875*, 64 AMER. HIST. REV. 537, 550-52 (1959).

rights," Senator Joshua Hill, a Georgia Republican, rose to deny this. He declared: "Nor do I hold that if you have public schools, and you give all the advantages of education to one class as you do to another, but keep them separate and apart, there is any denial of a civil right in that."[13]

Sumner denied that separation was equality, and maintained that both races were forced into inequality by being separated. He asserted that "Equality is where all are alike. A substitute can never take the place of equality." Although discussion was principally centered on railroads, Sumner also applied the rule to schools. He observed:

> Show me, therefore, a legal institution, anything created or regulated by law, and I show you what must be opened equally to all without distinction of color . . . .[N]otoriously, schools are public institutions created and maintained by law; and now I simply insist that in the enjoyment of those institutions there shall be no exclusion on account of color.[14]

Sumner then started reading letters from Negroes. One of them suggested that "In our public schools is the place to commence to break down caste."[15] A resident of West Virginia protested that the local insane asylum would not accept her son, but Senator Arthur I. Boreman, a West Virginia Republican, replied that this was due to overcrowding and not racial discrimination.[16] Ultimately, Sumner's bill was ruled out of order.

The next day, Sumner again moved his amendment in the Committee of the Whole.[17] Debate centered around contentions that Sumner's amendment would destroy any chance for passage of the amnesty bill.[18] Sumner modified the school clause to include those "being supported by monies derived from general taxation." A vote was then taken, and Sumner's proposal lost by 30 to 29.[19]

Sumner renewed his amendment in the whole Senate.[20] When Congress returned from its Christmas holiday, he made a long speech urging his amendment on January 15, 1872. He first protested that "among us little children are turned away and forbidden at the door of the common school, because of the skin."[21] He also declared that "Equality

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[13] *Id.* at 241.
[14] *Id.* at 242.
[15] *Id.* at 244.
[16] *Id.* at 245.
[17] *Id.* at 263.
[18] *Id.* at 272.
[19] *Id.* at 274.
[20] *Id.* at 278.
[21] *Id.* at 381 (1872).

in all institutions created or regulated by law, is . . . [not] a question of society," and therefore "no question of social equality" exists.[22]

Sumner decried separate schools and institutions of learning and science. He declared:

> It is easy to see that the separate school founded on an odious discrimination and sometimes offered as an equivalent for the common school, is an ill-disguised violation of the principle of Equality, while as a pretended equivalent it is an utter failure. . . .
>
> A slight illustration will show how it fails, and here I mention an incident occurring in Washington, but which must repeat itself wherever separation is attempted. Colored children, living near what is called the common school, are driven from its doors, and compelled to walk a considerable distance, often troublesome and in certain conditions of the weather difficult, to attend the separate school. One of these children has suffered from this exposure, and I have myself witnessed the emotion of the parent. This could not have occurred had the child been received at the common school in the neighborhood. Now, it is idle to assert that children compelled to this exceptional journeying to and fro, are in the enjoyment of equal rights. The superadded pedestrianism and its attendent discomfort furnish the measure of inequality in one of its forms, increased by the weakness or ill health of the child. What must be the feelings of a colored father or mother daily witnessing this sacrifice to the demon of Caste?
>
> . . . The indignity offered to the colored child is worse than any compulsory exposure, and here not only the child suffers, but the race to which he belongs is blasted and the whole community is hardened in wrong.
>
> The separate school wants the first requisite of the common school, inasmuch as it is not equally open to all; and since this is inconsistent with the declared rule of republican institutions, such a school is not republican in character. Therefore it is not a preparation for the duties of life. The child is not trained in the way he should go; for he is trained under the ban of inequality. How can he grow up to the stature of equal citizenship? He is pinched and dwarfed while the stigma of color is stamped upon him. This is plain oppression, which you, sir, would feel keenly were it directed against you or your child. . . .
>
> Nor is separation without evil to the whites. The prejudice of color is nursed when it should be stifled. . . . the school itself must practice the lesson [of equality]. Children learn by example more than by precept. How precious the example which teaches that all are equal in rights. But this can be only where all commingle in the common school as in common citizenship. . . . There should be no separate school. It is not enough that all should be taught alike; they must all be taught

[22] *Id.* at 382.

> together. . . . nor can they receive equal quantities of knowledge in the same way, except at the common school.
>
> . . . But even where a separate school is planted it is inferior in character. No matter what the temporary disposition, the separate school will not flourish as the common school. . . . That the two must differ is seen at once, and that this difference is adverse to the colored child is equally apparent. For him there is no assurance of education except in the common school, where he will be under the safeguard of all. White parents will take care not only that the common school is not neglected, but that its teachers and means of instruction are the best possible, and the colored child will have the benefit of this watchfulness. This decisive consideration completes the irresistible argument for the common school as the equal parent of all without distinction of color.[23]

Sumner analogized other institutions of learning or science, churches and cemeteries, "public in character and organized by law," to schools. He declared that separation would be insulting to Negroes.[24] He also scorned two Ohio decisions which held that a mulatto child would be entitled to go to school only if he had a sufficient amount of white blood in him to be generally recognized as white.[25] Sumner concluded with an extensive peroration on the Declaration of Independence and color prejudice. He reasoned that since the original Constitution did not mention color, "Equality is the supreme law of the land, 'and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.'" This he derived from "the original text of the Constitution, in presence of which you might as well undertake to make a king as to degrade a fellow-citizen on account of his skin."[26] Not once in his lengthy discourse did Sumner mention the fourteenth amendment.

Two days later, Sumner was again engaged in advocating his bill by reading letters from Negroes and others supporting it. One letter from a school controller in Reading, Pennsylvania stated that the colored school was situated away from the populated part of the city, and the children had to walk several miles through inclement winter weather to go to school. The controller stated that he had ordered four colored

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[23] *Id.* at 384. Senator Sumner also stated:

> There can be no substitute for equality; nothing but itself. Even if accommodations are the same, as notoriously they are not, there is no Equality. In the process of substitution the vital elixir exhales and escapes.

Id. at 383.

[24] *Id.* at 384.

[25] *Id.* at 385, discussing Lane v. Baker, 12 Ohio 237 (1843) and Van Camp v. Board of Educ. 9 Ohio St. 406 (1859).

[26] CONG. GLOBE, 42d Cong., 2d Sess. 385 (1872).

children admitted to a neighborhood white school, but the school board threatened him with impeachment, and return of the colored children to their school. Sumner declared that this letter was evidence that separate schools were not equivalent, and placed a hardship on Negroes.[27] Likewise an article was read which described the burning of colored school houses in Texas. Sumner added: "A separate school becomes at once an indignity to the race, and also a mark and target for the arrows of their enemies."[28] He also read a letter from a Negro lawyer who was a professor at Howard University, which stated that no matter how good the educational facilities were, a Negro could not be properly educated "if he is not made to feel in the common school, the academy, the college, and the professional school, that his manhood . . . [is] recognized and respected."[29] Sumner read yet another resolution demanding equal treatment in public schools and other places of learning drawn up by professors and students at Howard University, which denied that this had any relation to social equality. He declared that the "separate school has for its badge inequality," and urged that this was contrary "to the promises of the Declaration of Independence." Sumner concluded by reading with approval from a report of the trustees of the colored schools in the District of Columbia, as follows:

> It is our judgment that the best interests of the colored people of this capital, and not theirs alone, but those of all classes, require the abrogation of all laws and institutions creating or tending to perpetuate distinctions based on color, and the enactment in their stead of such provisions as shall secure equal privileges to all classes of citizens. The laws creating the present system of separate schools for colored children in this District were enacted as a temporary expedient to meet a condition of things which has now passed away. That they recognize and tend to perpetuate a cruel, unreasonable, and unchristian prejudice, which has been and is the source of untold wrong and injustice to that class of the community which we represent, is ample reason for their modification. The experience of this community for the last few years has fully demonstrated that the association of different races in their daily occupations and civic duties is as consistent with the general convenience as it is with justice. . . . Yet while the fathers may sit together . . . the children are required by law to be educated apart. We see neither reason nor justice in this discrimination. . . .
>
> Children, naturally, are not affected by this prejudice of race or color. To educate them in separate schools tends to beget and intensify it in their young minds, and so to perpetuate

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[27] *Id.* at 432.

[28] *Id.* at 433.

[29] *Ibid.*

> it to future generations. If it is the intention of the United States that these children shall become citizens in fact, equal before the law with all others, why train them to recognize these unjust and impolitic distinctions? To do so is not only contrary to reason, but also to the injunction of Scripture, which says, "Train up a child in the way he should go, and when he is old he will not depart from it."[30]

Senator Frederick T. Frelinghuysen, a New Jersey Republican lawyer and a former attorney-general of that state, next arose to suggest that many colored people had saved money and purchased churches, schools, and colleges for their use. He objected that Sumner's bill might allow the more numerous white population "to wrest this property from the colored people." On the other hand, Frelinghuysen noted that Sumner could not "make the amendment I propose without falling into the absurdity of discriminating against whites while attempting to abolish the distinction of races." Frelinghuysen therefore suggested the following exemption to "perpetuate to the colored people their own institutions. . . ."

> *Provided,* That churches, schools, cemeteries, and institutions of learning established exclusively for either the white or the colored race, shall not be taken from the control of those who established them, but shall remain devoted to their use.[31]

Several days later, Sumner added the substance of this proviso to his bill, namely:

> But churches, schools, cemeteries, and institutions of learning established exclusively for white or colored persons, and maintained respectively by the contributions of such persons, shall remain according to the terms of the original establishment.[32]

When Senator Allen G. Thurman, an Ohio Democrat and a former chief justice of the state supreme court, declared that the whole bill was unconstitutional, Senator James W. Nye, a Nevada Republican lawyer, belittled these objections. To this Thurman replied that "I am not accustomed to attempt impossibilities . . . and therefore I would never attempt to make the Senator from Nevada understand a constitutional argument. (Laughter)"[33]

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[30] *Id.* at 434.

[31] *Id.* at 435.

[32] *Id.* at 487. The senators may have had Girard College in Philadelphia in mind. For an extensive account of the litigation concerning the Girard will and Girard College, see *In re* Girard's Estate, 386 Pa. 548, 127 A.2d 287 (1956).

[33] CONG. GLOBE, 42d Cong., 2d Sess. 495 (1872). See also *id.* at 530-31.

On January 25, 1872, Sumner's position received a grievous blow from an erstwhile ally, Senator Lot M. Morrill of Maine, a Radical Republican lawyer who had played a prominent part in anti-slavery measures during the Civil War,[34] and who had voted in favor of the fourteenth amendment in the Senate. [35] Morrill condemned the whole proposal as being in excess of Congress' power under the fourteenth amendment. Adverting to the school clause, Morrill declared:

> Sir, is it a right of the Government of the United States to take the direction of the education of the people? . . . But can they . . . [take] the direction of the common schools of the States? That is the proposition. That is invading a province, I repeat, which lies outside of the domain of this Government. That is invading a province which is within that domain which is provided for in the Constitution of the United States, when it says that the powers not herein delegated are reserved to the people or to the States. That is a province which you cannot invade.[36]

Senator Eli Saulsbury, a Delaware Democrat, also attacked the bill saying:

> If a man . . . of his own motion sends his children to the same school to be educated in the same class, . . . then he chooses social equality with negroes for himself and his children. . . . But, if, on the other hand, he is compelled to . . . send his children to the same school, then it is enforced social equality . . . .[37]

Saulsbury condemned compulsory school integration, and pointed out:

> [T]he Senator from Massachusetts proposes to compel the white people of the country, who are dependent upon common schools for the education of their children, to send them there to associate with colored children, or to keep them at home without the advantages of acquiring an education.
>
> The rich man is not dependent upon common schools for the education of his children; even men in moderate circumstances may be able to send their children to select schools or colleges; but the poor man who labors from day to day for the maintenance of his family, with scarcely a dollar to spare for any other purpose, must educate his children at the common

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[34]Avins, *Freedom of Choice in Personal Service Occupations: Thirteenth Amendment Limitations on Anti-Discrimination Legislation*, 49 CORNELL L.Q. 228, 233 (1964).

[35]CONG. GLOBE, 39th Cong., 1st Sess. 3042 (1866).

[36]CONG. GLOBE, 42d Cong., 2d Sess. app. 4 (1872).

[37]*Id.* at 9. See also CONG. GLOBE, 42d Cong., 2d Sess. 913 (1872): "[T]he Federal Government shall, through United States courts, coerce social equality between the races in public schools. . . ."

> schools or they must go without an education. It is that class of men against whom this legislation is directed. The children of the poor men of the country must be educated with Negroes, while the children of the rich are to be placed in schools of a higher grade.[38]

Saulsbury then declared that none of the Senators voting with Sumner would send his child to a mixed school in the south where there was a large number of Negroes. He pointed out that poor whites had just as much a desire to educate their children as did rich ones, and that they ought not to be deprived of the ability to obtain a segregated education for their children because of lack of funds. He predicted that southern and border-state whites would boycott the mixed schools and that the school system would be destroyed there.[39]

Sumner could afford to ignore Saulsbury's protests, but Morrill's thrust, if unrebutted, might change votes in a closely divided Senate. Sumner's reply to Morrill's constitutional challenge was characteristic. He read more letters from Negroes asking that the bill be passed and complaining about discrimination.[40] Ultimately when Sumner came to constitutionality, he declared:

> [T]he Constitution is full of power; it is overrunning with power. I find it not in one place or in two places or three places, but I find it almost everywhere, from the preamble to the last line of the last amendment.[41]

Sumner urged Morrill to "read between the lines" and to interpret the Constitution by the Declaration of Independence. He rested in addition on the thirteenth amendment. The fourteenth amendment was thrown in as an afterthought because Sumner was "profoundly convinced that the conclusion founded on the thirteenth amendment was unanswerable, so as to make further discussion surplusage . . . ."[42] Sumner concluded by reading a constitutional rebuttal to Morrill in a letter written by a Negro whose analysis was as imprecise as Sumner's own thinking, and, by threatening the Republicans with a loss of colored votes at the next election.[43]

Morrill was offended by the threat of withdrawal of colored votes, and unimpressed by Sumner's constitutional rebuttal. He ridiculed the arguments based on the Declaration of Independence and the thirteenth amendment. But Sumner stuck to the Declaration as a source of au-

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[38]CONG. GLOBE, 42d Cong., 2d Sess. app. 10 (1872).
[39]*Id.* at 10-11.
[40]CONG. GLOBE, 42d Cong., 2d Sess. 726-27 (1872).
[41]*Id.* at 727.
[42]*Id.* at 728.
[43]*Id.* at 729.

thority,[44] even when this theory was once again derided by Senator Matthew H. Carpenter, a Wisconsin Republican lawyer.[45]

Under questioning by Thurman, Carpenter supported the bill in respect to public schools. He said:

> I have no doubt of the power of this Government under the fourteenth amendment . . . to say that a colored man shall have his right in the common school . . . . The distinction seems to me to be broad and clear and well-founded between those voluntary institutions, whether incorporated or not, which we ought not to interfere with, and those great institutions which are supported by law and maintained by general taxation. . . . Now, to say that the children of one class of citizens shall not have the benefit of a common school supported at the public expense by general taxation . . . is a thing which I never will countenance or give the slightest support to.[46]

Thurman answered that this was not the question, that no one suggested that colored children be excluded from school. He said that the issue was whether the federal government could proscribe state regulation and require integrated schools. Carpenter replied that the bill did not interfere with state power to regulate schools except in the one instance authorized by the Constitution, namely, to prevent exclusion of colored children from school.[47]

On February 5, Carpenter proposed an amendment designed to limit the bill to schools maintained at public expense or endowed for public use,[48] and not merely those incorporated by state law.[49] The next day,

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[44] *Id.* at 730.

[45] *Id.* at 761. See also *id.* at 823-27.

[46] *Id.* at 763.

[47] *Ibid. But see id.* at 819: "You propose . . . to put the children together in the schools."

[48] *Id.* at 818. The following colloquy occurred with Senator John Scott, a Pennsylvania Republican lawyer:

> Mr. SCOTT. . . . It applies to schools or colleges which are "supported by endowment for public use." Is the language such as to make it applicable to schools and colleges which have been endowed by private benefactions for the use of the public of any particular class that may be enumerated?
>
> Mr. CARPENTER. That is the intention of it, and I think it does. If the endowment is for public use, then the public are entitled to the benefit of it.
>
> Mr. SCOTT. Do I understand, then, that the proposed substitute would control the intention of the benefactor, if he, in making the endowment, has made it applicable only to certain classes and conditions?
>
> Mr. CARPENTER. No, Sir, I should not understand that to be an endowment for a public use, but for a particular and specified use; and this would not override it.

[49] *Id.* at 843. See CONG. GLOBE, 42d Cong., 2d Sess. app. 28 (1872).

Senator John Sherman, an Ohio Republican lawyer who had voted for the fourteenth amendment, defended the constitutionality of Sumner's bill, *inter alia*, to give to Negroes "the right to participate in your school fund, which is collected alike of black and white . . . ."[50] Sherman pointed to the privileges and immunities clause as the basis for Congress' power, and then said that one of the privileges was the right to equal protection of the law. He confused the subject even more when he came to the school clause, saying:

> It is the privilege of every person born in this country, of every inhabitant of the country whether born here or not, of a certain age, to attend our public schools which by law are set aside for the public benefit. Boys and girls go to the schools. It is the privilege of all, and declared to be so. All contribute to the taxes for their support; all are benefited by the education given to the rising generation; and therefore all are entitled to equal privileges in the public schools.[51]

Considering the fact that Sherman did not limit his discussion to citizens, and also considering the fact that the privileges and immunities clause is limited not only to privileges of citizens, but privileges of national citizenship, it is clear that Sherman was talking in very imprecise terms about the fourteenth amendment.

Sherman's colleague, Thurman, then arose. After identifying the privileges and immunities protected by the fourteenth amendment as those found in the original Constitution and the Bill of Rights, Thurman declared that no "such right guaranteed to a citizen [existed] as that he shall go into a common school in company with every other child that goes to that common school." Senator George F. Edmunds, a Republican lawyer from Vermont, who voted for the fourteenth amendment, replied that the equal protection clause of the fourteenth amendment is violated "when the law of the State. . . declares that a man of one color of hair or of skin may send his children, and the man of another color of hair may not send his."[52] The following then ensued:

> Mr. THURMAN. . . . The substance of the Senator's position is simply this: that although a State may give to every child in it equal advantages of education, it shall have no power of regulation over its schools. That is what it comes to.
>
> Mr. EDMUNDS. Oh no.
>
> Mr. THURMAN. It does; let the Senator hear me and he will see. Let me turn the argument of the Senator. Is not a female child a citizen? Is she not entitled to equal rights?

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[50]CONG. GLOBE, 42d Cong., 2d Sess. 843 (1872).

[51]*Id.* at 844.

[52]CONG. GLOBE, 42d Cong., 2d Sess. app. 26 (1872).

> Why, then, do you allow your school directors to provide a school for her separate from a school for the male? Why do you not force them into the same school? Why do you allow the States to separate the sexes in the schools if every school that is set up and supported by public money is necessarily thrown open to every citizen of the United States? Will the Senator say that all the laws of the States providing for a division of the schools by sexes are unconstitutional and infringe the fourteenth amendment? He cannot say that; and if he cannot say that, his argument falls to the ground. Does not the separation exist by virtue of the power of regulation, which belongs to the State? All that can be claimed is this, that in regard to schools supported by the public money, that money shall be so applied as that each citizen shall have an equal advantage from its application. Therefore, preserving that equality, the State in the exercise of its power of regulation may apply a part of it to support a school for boys, a part of it to support a school for girls, a part of it to support a school for white children, a part of it to support a school for colored children. That is not denying them the equal protection of the laws in any sense whatsoever. In no wise is it denying them the equal protection of the laws. In no sense is it denying their equality before the law.[53]

Thurman also said that the bill denied people "the liberty to choose their own associates . . . in the school," and that "if the supreme power in a State, in the exercise of a wise judgment and discretion, and for the interest of education and of its youth sees fit to make a regulation that white children shall be in one school and colored children in another, I am not in favor of depriving them of that right, of denying them that liberty." Thurman endorsed Saulsbury's argument that the bill was actually aimed at poor whites. He noted that even in Ohio, which had separate Negro and white schools, rich men sent their children to private schools. Thurman observed:

> When, therefore, you shall force colored children into the common school, you will not force them into an association with the children of the rich, (the children of the rich will not be there,) but you will force them into social intercourse with the children of the poor whites; and the tendency of your law, instead of being to elevate the colored race to the level of the white, will be to pull down the poor white child to the level of the black. . . . Instead of elevating the negro, it is to depress the white. The rich man's child goes to some seminary of learning supported by wealth and the contributions of the rich; he associates with no colored child. . . . but the poor man's child must have that social equality thrust upon him, or he must go

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[53] *Id.* at 26-27.

> without education. . . . I say from experience, first, that there is no necessity for this admixture in the schools; and, in the second place, that the worst enemy of the common-school system could not devise a worse thrust at it than this very amendment of the Senator from Massachusetts.[54]

Senator Orris S. Ferry, a Connecticut Republican lawyer, attacked the school clause on other grounds. He stated that the bill did not affect his state, which always had integrated schools, but he opposed any federal interference in state control of its schools.[55] He declared that the legislation as a whole went beyond the equal protection clause of the fourteenth amendment.[56] Senator James K. Kelly, an Oregon Democratic lawyer, added that "Most of the States have schools for colored children and separate schools for white children."[57]

Senator George Vickers, a Maryland Democratic lawyer, also spoke against the constitutionality of the school clause. He said it was not a privilege or immunity of national citizenship to attend school. He asked: "Because he has a right to study a profession at his own expense, pursue an avocation at his own cost, does that give him the right to go into your public schools or into any of your schools and acquire information and education at the expense of the State or of other people?" Vickers said that Negroes paid very little school taxes, and that mixed schools would destroy the usefulness of schools. He reiterated Thurman's argument that public school integration would affect only poor whites, and that if the federal government had the power to interfere with a regulation requiring racial segregation, it could interfere with all other regulations. Vickers concluded:

> If you can legislate for the purpose of obtaining an education for the negro by the side of the white, you can do so also for the purpose of securing an equal proportion of the teachers, because it may be said that colored persons have not equal advantages unless they are taught by persons of their own hue.

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[54] *Id.* at 27.

[55] CONG. GLOBE, 42d Cong., 2d Sess. 892 (1872). Senator Ferry said:
It is because this amendment of the Senator from Massachusetts exerts Federal authority over the schools and the school officers of the States that the provision which the Senator has placed in it is most objectionable. . . . [I]f you give to the Federal Government power to interfere in the regulation of the schools of the different States upon one subject, I do not see how you are to restrain that power in reference to other topics relating to education; and so we see and hear how continually more and more of efforts made to bring the Federal Government into direct control of the school systems of the States.

[56] *Id.* at 893.

[57] *Id.* at 894.

> And if you can do it in reference to teachers, you can do it in reference to books, you may do it in relation to the subjects to be taught. It is, I repeat, a question of power. Once invade the sanctuary of the school, and you can assume entire control over the system and all its details.[58]

Vickers also declared that the states could better run the schools than the federal government since they were closer to the people.[59]

Senator Lyman Trumbull, the veteran Illinois lawyer and legislator who, as Republican Chairman of the Senate Judiciary Committee, had shepherded to passage the Civil Rights Act of 1866, the forerunner of the equal protection clause of the fourteenth amendment, and had frequently acted as spokesman and leader of the Senate Republicans in the Thirty-Ninth Congress, spoke next. He confined civil rights to those enumerated in the 1866 statute, and defended segregation by railroads. He opposed the whole of Sumner's amendment.[60] At length, a vote was taken on Sumner's rider to the amnesty bill, and it resulted in a tie, 28 to 28. All the Democrats, the liberal Republicans, and almost half of the southern Republicans, opposed the amendment. The Radicals and half of the southern Republicans were with him. The vice-president then broke the tie in Sumner's favor.[61]

Senator Henry Wilson, Sumner's Massachusetts Republican colleague, warmly endorsed the combined bill, as "settling the question of equality in the primary schools of the country where so much is to be done to educate the rising generation of the country to forget caste and

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[58]CONG. GLOBE, 42d Cong., 2d Sess. app. 42 (1872), where Senator Vickers also stated:

> The children of the rich, of the middle classes, of all who have the ability to set up and sustain schools for their children, will not be affected, for they will not submit to the degradation which this amendment proposes; and the necessary result will be that the children of the poor, as dear to their parents as the children of the rich are to them, will be obliged to be educated side by side with the negro and mulatto or be reared in ignorance and vice. The friends of this measure are unwilling that separate schools for the races shall be provided, and "equality" being their motto, they seem determined to force it upon the community, at the hazard of producing intense feeling and opposition, and the destruction of the school system.
>
> . . . .
>
> Suppose it be thought proper to separate the sexes on the ground that the pupils will progress more rapidly and efficiently, that it will be more to their interest and advantage that this order or arrangement shall obtain; if the principle of this bill is sustained you have the power to change that regulation as well as any other.

[59]*Id.* at 43.

[60]CONG. GLOBE, 42d Cong., 2d Sess. 901 (1872).

[61]*Id.* at 919.

believe in the equality of our common humanity."[62] But a number of the strongest supporters of amnesty stated they would vote against the combined bill because they regarded Sumner's bill as unconstitutional.[63] Saulsbury also predicted it would break up the Delaware school system.[64] The vote on the combined measure was 33 to 19, less than the necessary two-thirds required to pass the amnesty bill.[65]

On February 19, a bill similar to Sumner's was introduced in the House.[66] Congressman James G. Blair, a Missouri Republican lawyer, attacked the bill as unconstitutional,[67] and particularly excoriated the school clause as one enforcing social equality. He noted that his state had segregated schools, and that since the facilities, books, and instruction were free and equal, Negroes lacked no rights possessed by whites, and the provision "to force Negro social equality upon the white children of the country" was obnoxious. He declared:

> As long as the white children are opposed to having negro children associate with them in our schools I will never force or coerce them to it, especially when the negro children can get the same education in separate schools. Nor would I . . . force the white children upon the negro children contrary to their will.
>
> The time never was, and I hope never will be, when any man, white or black, or any race or nation of people, will have the legal right to my society or the society of my children. The black and the white man alike, whether under the natural, civil, or common law, have ever had the Heaven-born privilege of choosing their own society, and I hope it may ever continue so.[68]

Blair predicted that white children would be driven to private schools if the schools were integrated, the school system would be abolished, and Negroes would be without education. He said that Negroes were not demanding integrated schools.[69]

Congressman Henry D. McHenry, a Kentucky Democratic lawyer, also decried the bill for "compulsory social equality and association with those whose company is distasteful to. . . ."[70] He observed that since a "rich man can educate his children in private schools, . . . this law will

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[62] *Id.* at 921.

[63] *Id.* at 926-28.

[64] *Id.* at 928.

[65] *Id.* at 928-29.

[66] *Id.* at 1116.

[67] CONG. GLOBE, 42d Cong., 2d Sess. app. 142 (1872).

[68] *Id.* at 143. Congressman Blair also said: "[I]t is not depriving the colored children of any legal right by sending them to separate schools. . . ." *Id.* at 144.

[69] *Id.* at 143-44. See also *id.* at 18.

[70] *Id.* at 217.

be no great hardship upon him; but the poor man's child must look to the common schools or go without education, and this bill forces that child to sit on the same seat with the negro, and to be raised up in fellowship with him."[71] McHenry predicted that the people would abolish the school system rather than submit to integrated schools. He added:

> It would not be right for a State to tax negroes to educate the whites unless they had the privilege of the schools, and in every State where they are so taxed they have that privilege. In my State we do not tax them for school purposes, nor have we undertaken to educate them, and we do not propose to be forced to do so by despotic laws. For many years we had no common-school system at all, and it is only of recent date that our system has become efficient, and after we have paid the enormous taxes imposed on us [to] educate the white children, it is unreasonable to ask us to tax ourselves further to educate the negroes who pay no tax, comparatively speaking.[72]

Somewhat later, Congressman James C. Harper, a North Carolina Democrat, condemned the school clause. He read from a Virginia Republican newspaper predicting that integration would destroy the school system. He decried the harsh penalties against school officials,[73] and predicted: "Nor will the northern States be exempt from similar afflictions." He said that Negroes would try to force themselves into northern schools and colleges. He concluded that not even Negroes wanted mixed schools in the South, and that compulsory integration would destroy the school system.[74] Congressman John M. Rice, a Kentucky Democratic lawyer, also predicted that the school clause would destroy the school system in many states, and that people would use private schools.[75]

On May 4, 1872, Senator Thomas F. Bayard, a Democratic lawyer from Delaware, made a lengthy attack on proposed school integration in the District of Columbia. He first noted that colored schools in the District had been generously provided for out of taxes largely raised from whites, and that if colored schools were inferior with such a generous provision for their support, it was but "an admission [of colored] inferiority, an absolute inferiority, a confession of some great defects which must exist by the law of nature, and against which these puny efforts of human legislation will prove utterly and absurdly fruit-

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[71] *Id.* at 218.
[72] *Ibid.*
[73] *Id.* at 370.
[74] *Id.* at 371.
[75] *Id.* at 597-98. See also *id.* at 383.

less."[76] After detailing the money spent on accommodations for colored schools, Bayard went on to urge the Senate to take into consideration the prejudices of the people. He stated that there was a division of opinion among the Negroes about school integration, and that the whites were overwhelmingly opposed to it. He added that the senators who intended to vote for this measure would not send their own children to integrated schools, although they intended to consign the children of poor whites to such schools.[77] Bayard also predicted that the rich would withdraw their children to private schools, and that school integration would drive white children out of the public schools of the District and would discourage skilled white workers from moving into the District. He closed with an attack on Sumner's proposal as one calculated to result in miscegenation by breaking down race prejudice in children while they were still young.[78]

Three days later, there was some further debate on Sumner's bill to desegregate schools in the District. Trumbull took a dim view of it, while Sumner and Edmunds strongly urged it.[79] Ferry urged a local referendum on school desegregation, calling Sumner's bill "a tyrannical rule from without."[80]

On May 8, the Senate returned to the amnesty question,[81] and Sumner immediately moved to annex his civil rights bill to the amnesty bill which the House had passed[82] During the ensuing debate and parliamentary maneuvering, Trumbull criticized his fellow Republicans with some warmth for saddling the amnesty bill with Sumner's measure. The following colloquy then occurred:

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[76] *Id.* at 353.

[77] *Id.* at 353-55. He said:

> Senators, there is not a Senator on this floor who expects his children, . . . ever to go to those schools and to be subjected to this contact, who will vote for this bill; not one; not one. . . . [T]hey may condemn the children of their brother white men, whose poverty compels them to send their children to public schools, they may seek to compel them to this contact, but they will be very careful that they are not personally the sharers in such results.
>
> No, sir, no blue-eyed, fair-haired child of any Senator on this floor, no little grandchild at that time of life when children are so open to mere impression, and especially to evil impression, will ever be permitted to suffer by this proposed contact. They may condemn others who are poorer, but they will be careful to save their own.

Id. at 355.

[78] *Id.* at 355-57.

[79] CONG. GLOBE, 42d Cong., 2d Sess. 3123 (1872).

[80] *Id.* at 3124-25.

[81] *Id.* at 3179.

[82] *Id.* at 3181.

> Mr. EDMUNDS. How about the right to go to a public school?
>
> Mr. TRUMBULL. The right to go to school is not a civil right and never was.
>
> Mr. EDMUNDS. What kind of a right is it?
>
> Mr. TRUMBULL. It is not a right.
>
> Mr. EDMUNDS. What is it?
>
> Mr. TRUMBULL. It is a privilege that you may have to go to school. Does the Senator from Vermont mean to force everybody to go to school?
>
> Mr. EDMUNDS. No, but I mean to force everybody to let anybody go to school who is a citizen of this country who wants to go.
>
> Mr. TRUMBULL. Well, I think you cannot do any such thing. . . . I deny his right as a member of Congress to force anybody into a school, or to force anybody to take anybody into a school. . . . The Senator . . . is not speaking of the District of Columbia; he is speaking of a bill for the country.[83]

Ferry then chimed in to say that Negroes were not denied any rights in the District of Columbia, and that it was "precisely the same for blacks as for whites in this District." Trumbull re-echoed this point and thanked Ferry for his remark, and pointed out "that there is no discrimination" in the District schools. Ferry added:

> The same facilities, the same advantages, the same opportunities of education are given to the white child and the black child in the District of Columbia to-day. The only difference is that they do not receive those equal facilities and advantages in the same school-room; and you might as well deny that equal facilities and equal advantages exist in the northern States to the two sexes where the sexes are by the action of the authorities taught in different school-rooms or school buildings, as to deny it here.[84]

Edmunds asked Ferry whether colored children could go to as high a grade of school as white children could, and the latter answered in the affirmative. Edmunds then asserted that it was no more equality before the law to segregate students by law than it would be to require Negroes to use one street and whites to use another street. Ferry then asked Edmunds whether segregation in schools by sex in New England was a denial of right, and the latter replied that he did not know, but analogized racial segregation to segregation by color of hair or nativity, which he declared was a denial of right. Ferry then asserted "that it is not a denial of equality of right" to "have different rooms for

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[83] *Id.* at 3189.

[84] *Id.* at 3190.

the education of the races."[85]

Trumbull then reiterated that "going to school was not a civil right, and that so far as I know the colored people of this country had all the civil rights that the whites had, and it is a misnomer to call this a civil rights bill." Trumbull declared that Edmund's "position about the schools was indefensible. . . ." He added:

> I do say, in reply to the Senator from Vermont, that the right to go to school is not a civil right, and that the schools are regulated all over the land, and must be, for the advancement of education. We have graded schools. Boys of one class are kept in one room; of another class in another; the girls are confined to one room and the boys to another; but this is not a denial of civil rights to either. If the facilities for education are the same nobody has a right to complain. This which the Senator speaks of as a civil right is no civil right at all.[86]

Senator Oliver P. Morton, an Indiana Republican lawyer, then asked Trumbull what kind of a right it was to go to school if not a civil right. Trumbull replied that it was "not any right at all" but a matter "to be regulated by the localities." Trumbull said that the states could abolish schools. He repeated that civil rights were only those protected by the Civil Rights Act of 1866.[87]

Morton then replied that Sumner's amendment did not require free schools to be maintained by the states, but where such schools were "supported by taxes levied upon everybody without regard to color . . . there shall be an equal right to participate in the benefit of those schools created by common taxation. That is the point. . . ." Morton added: "If a right to participate in these schools is to be governed by color or any other distinction, I say that is a fraud upon those who pay taxes." Morton concluded that it made no difference whether the right to go to school was deemed a civil right or not, but where taxes were raised from all persons for schools, "there is a civil right that there shall be equal participation in those schools."[88]

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[85] *Ibid.*

[86] *Ibid.*

[87] *Id.* at 3190-91. He said: "We have colleges in the country, and a student who applies there and pays his tuition fees, you may say, has certain rights there; but they are not what I understand to be embraced in the general broad term 'civil rights.'" *Id.* at 3191.

[88] *Id.* at 3191. The following colloquy then occurred:

> Mr. MORTON. . . . The proposition that I made was that where schools were supported by taxation upon everybody, there must be equal rights to everybody in those schools. . . . Now, the substance of the Senator's position is this, and it needs but to be stated to be understood, and I think universally execrated, that there exists a right to levy a tax upon everybody, white and black, for

Senator John Sherman, the Ohio Republican lawyer who had voted with Trumbull for the fourteenth amendment, reminded the latter that he was author of and leader in the passage of the Civil Rights Act of 1866, and that the fourteenth amendment added to Congress' power since then.[89] Sherman pointed to the need to allow Negroes to share equally in school funds, and declared that Sumner's bill simply carried out the purposes of the 1866 act.[90] Sherman went on to point out that the bill permitted private schools to discriminate, but only required "that the children of negroes shall have an equal and fair share in the enjoyment of that which is collected by public taxation." Sherman then said:

> The supreme court of the State of Ohio have recently passed upon our own law in that State, which does in certain cases provide for separate schools for colored children, and have held it to be constitutional, and I believe they are right. There, in certain cases defined by the law, the colored peole may have, when they are of a certain number, separate schools, and provision is made in such cases as that for a distribution *pro rata* of the funds. In ordinary cases, by the common consent and custom of every one there since the war was over, the whites and the blacks go to the same schools.[91]

We may pause here to note that Sherman was undoubtedly referring to the decision in *State* v. *McCann*[92] of the previous day. He had been a member of the Ohio bar for almost thirty years at this time, and had been in Congress for a total of seventeen years. He was a regular, if not a Radical Republican. He had voted with the majority for all of its reconstruction measures, and even voted to impeach and remove President Andrew Johnson. He had participated actively in the debates on the fourteenth amendment, and voted for it on its passage. He had just been speaking about the constitutionality of Sumner's bill under the first section of the fourteenth amendment and defending it from Trumbull's attacks. Hence, when this veteran lawyer

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the support of common schools, and at the same time to deny to everybody an equal right to participate in the benefit of those schools. . . .
Mr. TRUMBULL. I never made any such statement.

[89] *Id.* at 3191-92.

[90] *Id.* at 3192. He said that the 1866 act
does not protect them in their right to the enjoyment of money collected from them and from other citizens of the United States for the education of their children, but that discriminations are made on account of race, color and previous condition of servitude . . . in the right to have one's children educated at the common school.

[91] *Id.* at 3193.

[92] State v. McCann, 21 Ohio St. 198 (1872).

and legislator affirmed the correctness of the *McCann* decision, it adds the strongest possible weight to the case. In other words, Sherman affirmed the constitutionality of having local school boards set up segregated schools or desegregated schools, under authority of law, in accordance with local sentiment in the area.

Sherman reinforced this position by pointing out that in many Ohio communities there were integrated schools and that no problems resulted, as the white and Negro children got along well together. He said that in "northern States . . . not the social distinction but the distinction of rights" soon disappears. He added:

> In the southern State my opinion would be that for a time it might be a matter of municipal regulation, it might be a matter of convenience assented to both by whites and blacks to keep them in separate schools.[93]

Senator Arthur I. Boreman, a West Virginia Republican and former state judge, also denied that school segregation violated equal rights.[94] Senator Francis P. Blair, a Missouri Democratic lawyer, likewise advocated separate schools for Negroes.[95] Trumbull once again called Sumner's bill a "social equality bill," just what the Democrats were calling it.[96]

Ferry then moved to amend Sumner's bill by striking out the school clause. He first advocated local control over the schools.[97] He then noted

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[93]CONG. GLOBE, 42d Cong., 2d Sess. 3193 (1872).

[94]*Id.* at 3195. He said:

> It is said here we are denying equal rights to the colored and white people in the schools. I deny it. The same provision in regard to schools exists in reference to the white and colored children of the country in most of the States. It is so in my State. It is true that there are separate schools, schools for white children and schools for the colored; but nevertheless the provisions of the school laws from beginning to end apply precisely to the one as they do to the other; and it is just as much a violation of the right of a white child to keep him out of a black school as it is of a black child to keep him out of a white school, if we are narrowed down to such a proposition as that. The time will come, I have no doubt, when these distinctions will pass away in all the States, when school laws will be passed without this question appearing upon the face of those laws; but it is not so now, and for the present I am willing to allow the laws of the State to remain as they are where they provide schools for both classes.

[95]*Id.* at 3251. See also *id.* at 3253.

[96]*Id.* at 3254.

[97]*Id.* at 3257. He declared:

> And hence, when an effort is made directly by Federal legislation to dictate to the local communities what is most expedient as to the management of the particular schools under their care, you are commencing a species of

that the Negro population of the District of Columbia was rapidly increasing, and that if schools there were integrated it would drive the whites out of the District. He referred to the law of Ohio, which permitted each district to have mixed or separate schools, and read from a newspaper account of the *McCann* decision. He said that the Ohio Supreme Court, a majority of whose members were Republican, had upheld separate schools under the fourteenth amendment, and added:

> I believe that that decision of the supreme court of Ohio is good law. There is nothing, then, in the establishment by different communities, as each may think it expedient for itself, of separate schools, in conflict with the fourteenth amendment; and the proposition with respect to schools therefore is simply by legislation by Congress, without any constitutional provision demanding it, acting compulsorily upon all the school districts in the United States.[98]

The Ferry amendment lost by the narrow margin of 26 to 25. Those for the motion included thirteen Democrats, three southern Republicans, and nine other Republicans, two from Connecticut and one each from Illinois, Indiana, Iowa, Nebraska, New York, Pennsylvania, and West Virginia. Trumbull probably cast the most significant affirmative vote. Eight southern Republicans voted in the negative, joined by eighteen northern Republicans. Ten of these had voted for the fourteenth amendment as a member of the Senate, and three as a member of the House of Representatives. Probably the most significant vote to retain the school clause was cast by Sherman, who had just affirmed the constitutionality of segregated schools.[99] Blair then offered the following amendment: "the people of every city, county, or State shall decide for themselves, at an election to be held for that purpose, the question of mixed or separate schools for the white or black people."[100]

Senator James L. Alcorn, a Mississippi Republican lawyer, then spoke in favor of local control over schools. He stated that the legislature of Mississippi, controlled by colored people, had provided for segregated schools, which was satisfactory to both whites and Negroes. He added that separate white and Negro universities were established with equal endowments and concluded that the question had been settled by the legislature and he wanted no more trouble about it. Sumner replied to him by reading from a paper by Frederick Douglass which rejected

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legislation whose principle is, in my judgment, fatal to the school system of the country.

[98] *Id.* at 3258.

[99] *Ibid.*

[100] *Ibid.*

the right of the people of the District of Columbia to vote on whether schools should be desegregated.[101] Sumner added:

> You are called on to decide whether you will give your sanction to a system of caste which so long as it endures will render your school system a nursery of wrong and injustice, when it ought to be of right. How can you expect the colored child or the white child to grow up to those relations which they are to have together at the ballot-box if you begin by degrading the colored child at the school and by exalting the white child at the school? Train up the child in the way he should go. There are Senators here who would train children in the way they should not go.[102]

Sumner then read from another paper by Douglass, as follows:

> Throughout the South all the schools should be mixed. . . . Educate the poor white children and the colored children together, let them grow up to know that color makes no difference as to the rights of a man, that both the black man and the white man are at home, that the country is as much the country of one as of the other. . . . Now, in the South the poor white man is taught that he is better than the black man. . . .[103]

Blair answered Sumner by saying that he favored upholding the right of local self-government and the right of the people of the states who pay taxes to decide how their schools should be managed. He endorsed Alcorn's argument that Congress should not override state laws. He observed: "The associations of our children are to be dictated by a central oligarchy seated here in Washington." Blair said that most of the school funds were collected from taxes paid by whites, and that the rich people could send their children to private schools, while the poor whites would be deprived of any schooling because the schools would be closed if Sumner's amendment passed. Blair concluded that the school clause was unconstitutional anyway.[104]

Senator Timothy O. Howe, a Radical Republican from Wisconsin, replied to Blair by first agreeing with Sumner's caste argument, and then by saying that segregated schools would require a double system of schools which would be more expensive than a single system. Howe concluded that authority to pass the provision was to be found in one of the

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[101] *Ibid.* Douglass said: "Why should it [Congress] not abolish the teaching of caste . . . whether the people of the District would have it done or not?"

[102] *Id.* at 3259.

[103] *Ibid.*

[104] *Ibid.* Senator Hill of Georgia added that most Negroes were content with separate schools.

three recently ratified amendments, but he did not say which one.[105] Edmunds also rose to answer Blair. He said that if it was proper to segregate children by race it would be proper to segregate native-born children from foreign-born children, children of Catholic parents from those of Protestant parents, children of Methodist parents from those of Congregationalist parents, and children of Democrats from those of Republicans. He emphasized that "if color is a distinction which is fit to be left to the States and the communities to decide upon as the test of rights, then we ought not to interfere." But Edmunds added in reference to religious, nativity, and political segregation:

> [T]he sense of all mankind would cry shame at such a thing, and yet this is precisely the same principle, unless you can maintain that this old notion of race . . . is one in which it is fit, under the constitutional principles of a free country, to base a distinction upon. The notion of sex or age, which the Senator from Connecticut alluded to, has nothing at all to do with the question; that depends upon questions of fitness and decency, as to cleanliness and good order and degree of education, and all that. That is a test which everybody can understand, and which you must leave to the local jurisdiction; but this is a matter of inherent right, unless you adopt the slave doctrine that color and race are reasons for distinction among citizens.[106]

Bayard then arose to denounce the bill as an unconstitutional usurpation of local self-government. Senator Eugene Casserly, a California Democratic lawyer who had once been Corporation Counsel of New York City, made the same assertion. To answer Sumner's argument about caste, Casserly read from the opinion of the Massachusetts Supreme Judicial Court in *Roberts v. City of Boston*,[107] which he said had first brought Sumner to public notice, and in which the court had rejected Sumner's argument and sustained public school segregation. Senator John P. Stockton, a New Jersey Democratic lawyer, whose expulsion or exclusion from the Senate in 1866 made possible Republican control of the Senate by the two-thirds majority necessary to override President Andrew Johnson's vetoes and pass the fourteenth amendment, contented himself by urging popular referenda and denouncing the bill for violating personal liberty.[108]

A vote was then taken and Blair's amendment lost by 30 to 23. One Pennsylvania Republican changed from his previous stand and voted negative, and three previously absent northern Republicans re-

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[105]*Ibid.*

[106]*Id.* at 3260.

[107]Roberts v. City of Boston, 59 Mass. (5 Cush.) 198, 209-10 (1849).

[108]CONG. GLOBE, 42d Cong., 2d Sess. 3261 (1872).

turned to vote with the majority. Three minority Republicans were now absent, but two previously absent Republicans returned to vote with the minority. One of them, Senator William Sprague of Rhode Island, was a Radical who had voted for the fourteenth amendment and to impeach and convict President Andrew Johnson. The votes of Trumbull and Sherman remained unchanged.[109]

Alcorn then warned once again that Sumner's bill would destroy the Mississippi school system, and the Republican Party's majority as well.[110] Trumbull also disapproved of Sumner's bill for "forcing white and colored children into the same schools. . . ."[111] A vote was then taken on annexing the civil rights bill to the amnesty bill, and a 29 to 29 tie resulted. The vice-president then voted in favor of Sumner's amendment.[112]

At the urging of Senator Roscoe Conkling, the property-rights minded New York Republican lawyer, Sumner accepted an amendment and eliminated all private schools merely because they were incorporated, leaving only tax-supported schools or those "authorized by law." Vickers, a Democrat, and Senator John Scott, a Pennsylvania Republican lawyer, suggested eliminating those "authorized by law." Sumner objected, and Boreman supported him on the ground that all persons were invited to use institutions of learning authorized by law. Sumner added that Harvard College and Amherst College in Massachusetts were not tax-supported, but since they were authorized by law, Sumner wanted to prevent them from discriminating.[113] Thereafter, a second vote on annexing Sumner's bill to the amnesty bill was taken. Again, a 28 to 28 tie resulted, and the vice-president voted in Sumner's favor.[114] But once again, the supporters of the amnesty bill, including Trumbull, who felt that Sumner's bill was unconstitutional, voted against the combined measure, and the vote of 32 yea to 22 nay was less than the requisite two-thirds.[115]

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[109] *Id.* at 3262.

[110] *Ibid.*

[111] *Id.* at 3263. Senator Edmunds also declared:

> The real trouble is, as is evinced by this debate, that the honorable Senator from Illinois does not believe that the right to go to a State school or to a District of Columbia school is a right that belongs to a citizen of the United States independent of color.

Id. at 3264.

[112] *Id.* at 3264-65.

[113] *Id.* at 3266-67. *But see,* AM. HISTORICAL ASS'N ANN. REP. 156 (1889), wherein it was stated that "the appropriations by the State to Harvard have amounted to $784,793, in addition to 46,000 acres of land. The state has also given $157,500 to Williams, and $52,500 to Amherst."

[114] *Id.* at 3268.

[115] *Id.* at 3270.

Several days later, Trumbull declared that "I want amnesty so much that I will vote for almost anything that is not unconstitutional to get it." But he added that Sumner's bill "has been misnamed a civil rights bill, proposing to establish social rights which is unconstitutional in its provisions, and which I shall not vote for."[116] Sumner replied to Trumbull by reading a speech by Frederick Douglass saying that Negroes wanted equal school rights but not social equality. Trumbull replied by reading a report of a speech by a Negro professor saying that he wanted social equality.[117]

Sumner then moved to tack his bill to another piece of legislation, and Boreman moved to strike out the school clause.[118] The latter protested that "here it is proposed to require that all laws in the several States providing for common schools and separating the races shall be nullified; that all shall be allowed to associate together in the same schools." Boreman said that his home State of West Virginia had segregated schools, and that these were as good or better than mixed ones. Sumner answered, urging defeat of Boreman's amendment "to expel caste from the common schools of the country." Ferry, in reply, ridiculed the argument that segregated facilities denied equality.[119] Thurman re-entered the discussion to say that Sumner had never pointed to any constitutional provision giving Congress power to enact the school clause. He pointed out that in the *McCann* Case the Ohio Supreme Court, composed of five Republican judges, had unanimously upheld the constitutionality of a school segregation law. He concluded that "of its soundness I do not think any good lawyer can doubt for a moment, [and] there is an end of all pretense of constitutional foundation for this bill."[120]

Edmunds next accused University of Georgia officials of refusing to let colored students get the benefit of an agricultural college education under the federal land grant act, and said that Negroes should be entitled to equal rights to obtain a federally-financed education. Hill replied that the university had no time yet to use the fund.[121] Alcorn once again protested that Mississippi had segregated schools, and that

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[116] *Id.* at 3361.

[117] *Id.* at 3362. Senator Trumbull also called it a "social equality bill" the next day. *Id.* at 3418, 3421.

[118] *Id.* at 3421.

[119] *Id.* at 3422. Senator Ferry said:

> It is nonsense, sir, to talk of the necessity of educating youth in the same building in order to give them equal facilities, advantages, immunities, rights. What matter whether they be in the same building or in different buildings, so that the educational facilities bestowed upon them are identical?

[120] *Id.* at 3423.

[121] *Id.* at 3424.

the colored university was getting more money than the white university at Oxford (University of Mississippi), while Blair added another dire warning about school closing.[122] Trumbull and Edmunds then got into a dispute as to whether Georgia was giving white students education in a university while Negroes were deprived of such education. Trumbull also reiterated that going to school was not a civil right. He added:

> I think all persons should have the benefit of our appropriation, and I think, too, in regard to money raised for schools by taxation, colored people should have it as well as white people. I have always thought so. I entertain no different view about that. But I do not believe in legislation forcing them into the same schools, or in our undertaking to control how they shall go to school by act of Congress. I believe myself that you should not tax the colored people for schools to educate white persons exclusively. I have no such idea as that.[123]

Edmunds replied that if the states could "establish separate schools you can establish separate courts . . . for colored men so that they should not disturb the pride or the prejudice . . . of white people who choose to attend other courts as suitors."[124]

Carpenter of Wisconsin finally decided to break the deadlock by bringing up an independent civil rights bill during an evening session while Sumner was away from the Senate chamber and while barely a quorum was present.[125] He moved an amendment which eliminated the school clause.[126] Several Republicans objected. One considered Carpenter's amendment "emasculating the bill entirely." Frelinghuysen specifically disapproved of eliminating the school clause. But Senator John A. Logan, an Illinois Republican lawyer, endorsed Carpenter's amendment and argued for elimination of the school clause because "it interfered with state laws." The Carpenter substitute was ultimately adopted by a vote of 22 to 20. The majority included thirteen Democrats, one southern Republican, and eight northern Republicans, including one from California, Illinois, Iowa, Kansas, Maine, Oregon, Pennsylvania, and Wisconsin. Probably the most significant vote to eliminate the school clause was cast by Morrill of Maine. The minority were all Republicans.[127] The Carpenter bill was then passed by a strict party-line vote of 28 to 14.[128]

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[122] *Id.* at 3425.
[123] *Id.* at 3426. See also Saulsbury's remark. *Id.* at 3428.
[124] *Id.* at 3427.
[125] *Id.* at 3727.
[126] *Id.* at 3730, 3734.
[127] *Id.* at 3735.
[128] *Id.* at 3736.

The Senate then took up the amnesty provision, and debated it until the next morning, when Sumner arrived. He moved to tack his original bill to the amnesty bill, protesting the "emasculated civil rights bill" adopted the previous night in his absence. He protested that "the spirit of caste will receive new sanction in the education of children."[129] But Sumner's entreaties were in vain. The Senate rejected his amendment by the lop-sided vote of 29 to 13, and went on to pass the amnesty bill by a vote of 38 to 2, with only Sumner and a western Radical voting in the negative.[130]

Sumner's disappointment knew no bounds, and he insisted that the rights of the Negroes had been sacrificed by his colleagues. But they told him that the limited bill "is all that can be accomplished at this session,"[131] and his strictures achieved no more than to irk his colleagues.[132] Thus, Sumner's bill died for that session of Congress.

III. Sumner's Legacy

When the first session of the Forty-Third Congress opened on December 1, 1873, President Grant had been re-elected the previous year. The Supreme Court had also decided the *Slaughter-House Cases*,[133] which reminded the lawyers in Congress that the fourteenth amendment, and particularly the privileges and immunities clause, did not radically expand the powers of the federal government. Since the civil rights bill depended for enforcement on the judiciary, it would have to run the gauntlet of Supreme Court review. A better constitutional basis would have to be found than the Declaration of Independence.

When the session opened, Sumner once again introduced his bill. Ferry of Connecticut and Morrill of Maine renewed a general attack on it as being unconstitutional.[134] Debate commenced in the House, where a copy of Sumner's bill had previously been introduced.[135] Congressmen Clarkson N. Potter, a New York Democratic lawyer, and Thomas Whitehead, a conservative Virginia lawyer who voted with the Democrats, both moved to strike out the school clause, while Congressman Charles A. Eldridgo, a veteran legislator, moved to allow separate accommodations for white persons.[136]

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[129] *Id.* at 3737-38. He added: "I ask the Senate to set its face against that spirit of caste now prevailing in the common schools. . . ." *Id.* at 3738.

[130] Id. at 3738.

[131] *Id.* at 3739.

[132] *Ibid.* See *id.* at 3740-41.

[133] Slaughter House Cases, 83 U.S. (16 Wall.) 36 (1873).

[134] 2 Cong. Rec. 10-11 (1873).

[135] *Id.* at 97, 337-38.

[136] *Id.* at 339.

Congressman Benjamin F. Butler, Republican Chairman of the Judiciary Committee, commenced his advocacy of the bill by noting that it gave nobody any rights he did not already have by common law, in which he included the right to go to a school supported at public expense or endowed for public use. He referred specifically to the common law of New England, England, and the United States generally, and said that the object of the bill was to abrogate state laws which discriminated against any class in exercising these rights.[137]

We may pause here to note that Butler's position as to the common law was not accurate. In England, at common law, no obligation existed for a parent to give his child an education,[138] and it was not until the twentieth century that it was finally held that a local school authority had a duty to admit children resident in the area.[139] In Canada, the obligation of local school authorities to admit children seems to have been recognized earlier.[140] In Ontario it had been held that separate schools might be established for colored children, in which case they would have no right to attend the common schools,[141] but if no segregated schools were set up, they would be entitled to go to the common schools.[142]

In the United States, there was never any general right apart from statute to attend school. The right to go to school was always restricted by such factors as residence.[143] In fact, at one time in some northern states free Negroes were not entitled to go to any school.[144] The

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[137]*Id.* at 340. See also *id.* at 412 (1874).

[138]Hodges v. Hodges, Peake Add. Cas. 79, 170 Eng. Rep. 201 (N. P. 1796).

[139]Gateshead Union v. Durham County Council, [1918] 1 Ch. 146 (C.A.).

[140]See *Ex parte* Miller, 34 N.B. 318 (1897); *Ex parte* Gallagher, 31 N.B. 472 (1892); Dunn v. Windsor Bd. of Educ., 6 Ont. 125 (1883).

[141]Hill v. Camden, 11 U.C. Rep. 573 (1854); *but cf.* Hutchison v. St. Catharines School Trustees, 31 U.C. Rep. 274 (1871).

[142]*Re* Stewart & Sandwich East School Trustees, 23 U.C. Rep. 634 (1864). In Washington v. Charlotteville School Trustees, 11 U.C. Rep. 569, 573 (1854), it was held:

> The Legislature does seem to have meant, though reluctantly, to give way so far to any prejudices that may exist in the minds of the white inhabitants, as to allow of the establishment of separate schools for the coloured people, if thought expedient, but not so far as to consent to shut them out from the only public schools that do exist, by leaving it discretionary in the school trustees to deny admission to them arbitrarily, where they have no other school to go to.

[143]See Wheeler v. Burrow, 18 Ind. 14 (1862); Inhabitants of Haverhill v. Gale, 103 Mass. 104 (1869); Opinion of Justices, 42 Mass. (1 Met.) 580 (1841); School Dist. v. Bragdon, 23 N.H. 507 (1851).

[144]Draper v. Cambridge, 20 Ind. 268 (1863); Van Camp v. Board of Educ., 9 Ohio St. 406 (1859); *cf.* Crandall v. State, 10 Conn. 339 (1834).

school directors were deemed to have broad powers of deciding what students should be admitted to which schools,[145] including the right to segregate them by race.[146] In fact, that very year the Supreme Judicial Court of Massachusetts, Butler's home state, had held that the right to attend school was a "political right" and not a private or civil right.[147] This was precisely the distinction which Trumbull had repeatedly insisted on.[148] By way of contrast, although free Negroes had no common-law right to attend school, even in the slave states before the Civil War, the courts had unanimously held that they had a right to obtain, hold, and dispose of property.[149]

Congressman James B. Beck, a Kentucky Democratic lawyer, opened the opposition attack by decrying compulsory school desegregation and asserting that, under the decision in the *Slaughter-House Cases,* Congress lacked power to legislate respecting state schools.[150] He, too, observed that racial segregation was no different in principle from segregation by sex, that rich children could be sent to private school so that the bill would only affect poor whites, and that compulsory desegregation would destroy the public school system.[151] Congressman John T. Harris, an unreconstructed Virginia Democratic lawyer, added to a similar argument about the bill's lack of constitutional foundation a long paean on the segregated public schools of Virginia and how integration would ruin them. He also read from letters by administrators that integration in insane asylums would aggrevate the mental illnesses of people there, and that it would ruin the school for the deaf, dumb and blind. He concluded that it would even break up the University of Virginia.[152]

Another Democratic attack came from Congressman Alexander H. Stephens, a Georgia Democrat and the distinguished former Vice-President of the Confederacy. In addition to asserting the constitutional argument derived from the *Slaughter-House Cases,* he stated that Georgia Negroes were content with segregated schools and a segregated

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[145]Grove v. School Inspectors, 20 Ill. 532 (1858); People v. Easton, 13 Abb. Pr. (n.s.) 159 (N.Y. Sup. Ct. 1872).

[146]State v. Duffy, 7 Nev. 342, 8 Am. Rep. 713 (1872); Dallas v. Fosdick, 40 How. Pr. 249 (N.Y. Sup. Ct. 1869).

[147]Learock v. Putnam, 111 Mass. 499 (1873).

[148]Cong. Globe, 42d Cong., 2d Sess. 901 (1872). See also notes 83, 86 and 87 *supra.*

[149]Tannis v. Doe, 21 Ala. 449 (1852); Ewell v. Tidwell, 20 Ark. 136 (1859); Davis v. Fitchett, 5 Fla. 261 (1853); Beall v. Drane, 25 Ga. 430 (1858); Bowers v. Newman, 27 S.C.L. 472 (1842); Winnard v. Robbins, 22 Tenn. 613 (1842); Hepburn v. Dundas, 54 Va. (13 Gratt.) 219 (1856).

[150]2 Cong. Rec. 342 (1873).

[151]*Id.* at 343.

[152]*Id.* at 375-77 (1874). See also *id.* at 405.

university.[153] He was answered by a South Carolina Negro Republican, Congressman Alonzo J. Ransier, who advocated the bill because "negro-haters would not open school-houses . . . to the colored people upon equal terms. . . ."[154] Representative Roger Q. Mills, a Texas Democratic lawyer, added an argument on the limited scope of the privileges and immunities clause of the fourteenth amendment and Congress' lack of power to legislate regarding schools under it. He, too, issued due warnings about school closing if the bill was enacted.[155]

The next day, Beck offered an amendment permitting segregation.[156] His colleague from Kentucky, Congressman Milton J. Durham, also a Democrat, after a stock *Slaughter-House Cases* argument, also warned that the school system there would be destroyed by integration. He noted that thousands of poor white children were for the first time being educated by a tax levied on white taxpayers. Since Negroes paid no school taxes, he urged that they should not go to white schools. Taxes levied on Kentucky Negroes were used exclusively to support colored paupers in many counties. He expressed the hope that eventually there would be colored schools in every part of the state, and offered a segregation amendment also.[157] Still a third school segregation amendment was offered by Congressman Lloyd Lowndes, a Maryland Republican lawyer.[158] Congressman James H. Blount, a Georgia Democratic lawyer, after stating that in his state Negroes had equal school facilities, added the usual warning about school closing if integration were required.[159]

Congressman William Lawrence, a former Ohio state judge and a Republican who had voted for the fourteenth amendment, was the next to speak. He read what was actually a legal brief in support of the bill, complete with citations to cases and other authorities supporting its constitutionality. He said:

> When it is said 'no State shall deny to any person the equal protection' of these laws, the word 'protection' must not be understood in any restricted sense, but must include every benefit to be derived from laws. . . . When the States by law create and protect, and by taxation on the property of all support, benevolent institutions designed to care for those who need their benefits, the dictates of humanity require that equal provision should be made for all. Those who share these benefits

153 *Id.* at 379-81.
154 *Id.* at 382.
155 *Id.* at 384-85. See also *id,* at 414-15 for a similar argument.
156 *Id.* at 405.
157 *Id.* at 406.
158 *Id.* at 407.
159 *Id.* at 411.

> enjoy in them and by them "the protection of the laws," the benefit of all that results from the laws which create, protect, and support them. And by the fourteenth amendment, no State shall deny to any the equal benefit of these laws, and Congress is charged with the duty of enforcing this equality of benefits or protection. . . .[160]

Lawrence went on to point out that the "design of the fourteenth amendment was to confer upon Congress the power to enforce civil rights." He quoted extensively from the debates in 1866 to show that the first section of the fourteenth amendment was proposed by Congress because of doubts about its constitutional power to enact the Civil Rights Act of 1866, and cited cases and commentary on the constitutional right of Congress to re-enact the 1866 act in 1871, which it did. He concluded that under the fourteenth amendment the "power to secure equal civil rights by 'appropriate legislation' is an express power. . . ."[161]

An exhortation from Congressman Josiah R. Walls, a Florida Republican Negro farmer, contained a potpourri of constitutional tidbits followed by a plea for the bill to "open up the common schools. . . ."[162] Next, Congressman William S. Herndon, a Texas Democratic lawyer, again read copiously from the *Slaughter-House Cases* to show that the bill was unconstitutional, and likewise predicted the end of southern school systems. He noted that the whites paid the taxes for both colored and white schools, and that they would refuse to levy taxes if the schools were integrated.[163]

In the course of a long harangue, Congressman William J. Purman, a Florida Republican lawyer, gave the following hypothetical example of "conditions of inequality" imposed by a "states-rights legislature" which Congress could legislate to prevent: "An act to exclude all children not clothed in velvet and such as have blue eyes from admission into any public school supported by public taxation."[164] Congressman William H. H. Stowell, a Virginia Republican carpetbagger, urged defiance of the threats to close the schools if the bill were enacted. He said that half of Virginia's population was illiterate, that schools were only open for five months a year, and that only fifteen per cent of the colored population attended school. He advocated the bill because "Our State constitution also provides for the education of all the children in

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[160] *Id.* at 412.

[161] *Id.* at 412-14. Congressman James Monroe, an Ohio Republican but not a lawyer, also urged an equal protection argument well mixed with declamation. *Id.* at 414.

[162] *Id.* at 417.

[163] *Id.* at 419-22.

[164] *Id.* at 423-24.

the old Commonwealth, and yet a democratic Legislature has practically excluded them from this privilege."[165] In reply, two Democrats read from Virginia Republican newspapers approving school integration and predicting elimination of public education as a consequence.[166] One of them also pointed out that it was no more a violation of equality to segregate by race than by sex, that the bill was actually designed to impose social equality, and that under the *Slaughter-House Cases* Congress had no power to pass it.[167]

The next day, when House debate closed, Congressman Milton I. Southard, an Ohio Democratic lawyer, read from the *McCann* case, noted that many states had school segregation laws, and pronounced the bill unconstitutional.[168] A Georgia Democrat declared that Negroes were being treated absolutely equally by school segregation laws, exhorted the House against forcing social equality, and issued the usual warnings about abandonment of public schools if the bill should pass.[169] A Missouri Democrat also defended school segregation, and added:

> When has President Grant chosen to take his children from a white school and send them to a colored school? . . . Why have we never witnessed the 'civil rights' advocates setting one solitary example of the propriety, the advantage, and the excellence of a law which they propose to enforce against their remonstrating countrymen with fire and sword? . . . Why do we not see them, by a delicious choice, . . . sending their children to negro schools? Why, sir, do they not do what they say is all right and proper, before they attempt to coerce us into compliance with an act most monstrous. . . .[170]

Butler closed the debate in his usual sarcastic manner. He said:

> Again, we are told that if we do pass this bill we shall break up the common-school system of the South. I assume this is intended as a threat. If so, to that I answer as Napoleon did, "France never negotiates under a threat." I regret the argument, if it was one, was put forward in that form. "Break up the common-school system of the South." Why, sir, until we

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[165] *Id.* at 426.

[166] *Id.* at 427, 429.

[167] *Id.* at 428.

[168] 2 CONG. REC. app. 1-3 (1874).

[169] *Id.* at 3-4 (remarks of Congressman Hiram P. Bell). See also 2 CONG. REC. 4053-55 (1874) (remarks of Congressman John D. C. Atkins) and *id.* at 726 (remarks of Congressman Henry R. Harris).

[170] 2 CONG. REC. app. 5 (1874).

> sent the carpet-baggers down there you had not in fact a common-school system in the South. (Laughter.).[171]

Butler then scorned the inadequacies of the southern school systems, and facetiously warned the southerners not to retaliate against Negroes because the latter did the labor in the South and if they left the southerners would be poverty-stricken. However, he remarked that retaining school segregation should be carefully considered because colored children were so eager for school that white truants might retard them in mixed classes.[172] The bill was then returned to the Judiciary Committee.[173]

Several days later, Congressman Robert Vance, a prominent Democratic ex-confederate, renewed the debate. He observed that the whites in his state of North Carolina had cheerfully taxed themselves for separate colored schools, and that this bill was a social rights bill which would break up the school system for both races. He stated that since the University of South Carolina had been integrated it had only six to nine students, and advocated school segregation.[174]

Congressman Richard H. Cain, a South Carolina Negro Republican, answered him. He said that although students had left the University of South Carolina, the buildings were still there and the professors still remained and taught the few who were there, so that the university was not destroyed. He added that integrated schools were being operated in a number of northern cities without problems. However, he chiefly wanted the retention of the school clause because without it Negroes in many areas were being deprived of any schooling whatever.[175]

Several days later, Congressman Samuel S. Cox, a New York

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[171] 2 CONG. REC. 456 (1874).

[172] *Id.* at 456-57.

[173] *Id.* at 457-58.

[174] *Id.* at 555-56.

[175] *Id.* at 565-66. He also said:

> I know that, indeed, some of our republican friends are even a little weak on the school clause of this bill; but sir, the education of the race, the education of the nation, is paramount to all other considerations. . . . Sir, if you look over the reports of superintendents of schools in the several States, you will find, I think, evidences sufficient to warrant Congress in passing the civil-rights bill as it now stands. The report of the commissioner of education of California show that, under the operation of law and of prejudice, the colored children of that State are practically excluded from schooling. Here is a case where a large class of children are growing up in our midst in a state of ignorance and semi-barbarism. . . . In Illinois, too, the superintendent of education makes this statement: that, while the law guarantees education to every child, yet such are the operations among the school trustees that they almost ignore, in some places, the education of colored children.

Id. at 566.

Tammany Democrat, opposed federal aid to education because it would be a lever for integrated schools.[176] He predicted that no matter what other rights were given to Negroes they would never be satisfied until they had this one.[177] He said that they wanted to educate white students against race prejudice.[178] Congressman William M. Robbins, a North Carolina Democrat, added that not only would the school clause destroy the southern school systems, but it would eliminate southern white Republicans as well. He added that Negroes did not want mixed schools.[179] Cain answered him by pointing out that it was a penal offense to educate slaves before the Civil War, and demanded that the school question be settled.[180] Ransier, his colleague, also answered the prior Democratic arguments that mixed schools would destroy the school system by pointing out that northern colleges, such as Yale, Harvard,

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[176] *Id.* at 614-18. These same arguments had been made in the previous session. See CONG. GLOBE, 42d Cong., 2d Sess. app. 15-16, 18 (1872).

[177] 2 CONG. REC. 616 (1874). He said:

But . . . if the civil-rights bill does come back with mixed schools out, the colored members here, and colored voters elsewhere, will not be satisfied. The battle will rage again. You may give them the freedom of the inn, the railroad, and the theater; you may bury them side by side with the white in the cemetery; you may go further, and provide that we shall all rise together out of the same mold in the resurrection, irrespective of race, of color, or of previous condition; but the broadvoweled Africanese tongue will talk, and . . . will still make its music of agitation. Gentlemen of white persuasion may tender the forty acres, but the inquiry still will be "Where's your mule?"

[178] *Id.* at 618. He quoted a prominent advocate of equality as follows:

Having this regard, you will not consent to have the clause securing us from proscription in public schools in the several States stricken from the civil-rights bill now before you. It is to us the clause of primary import. Public schools inculcate ideas, teach the rising generation. If the rising generation is taught by the State to look on the color of a citizen, and (as the arrangement setting them apart implies) to despise them, to regard the class as inferior, one that may be outraged, they not only, in thus educating them, unfit the despised as well as the despising class to sit on the juries, but the arrangement wars with the Constitution, which forbids any State from making or enforcing any law abridging the right of citizens. . . .

[179] *Id.* at 900.

[180] *Id.* at 902. Congressman Cain said:

The gentleman says that he does not desire that the colored people shall be crowded into the schools of the white people, Well, I do not think that they would be harmed by it; some few of them might be. But experience has taught us that it is not true that great harm will come from any such measure. I think, therefore, that if we pass this bill we will be doing a great act of justice, we will settle for all time the question of the rights of all people. And that until that question is settled there can not be that peace and harmony in the country that is necessary to its success.

Wilberforce, Cornell, and Oberlin, and Berea College in Kentucky all admitted colored students without ill effects. He noted that when colored students were admitted to Berea College, a number of white students left, but soon they returned. He quoted a report saying: "There is nothing like such a school as this to teach mutual respect . . . and to take away some of the arrogant superciliousness of caste and race." He concluded by quoting another writer, as follows:

> In times past the negro race has been the exponent of labor at the South; and it is, for many years to come, to be closely associated with it. If, therefore, this race is to be separated from all others in the public schools, and even the youngest children are made to feel that the race is set apart for its special mission and destiny in society, how can we hope to make labor respectable? The old badge of servile degradation will attach to it not only for the black man but for the white man. To place blacks and whites in the same school is not to say that the races are equal or unequal. It is to animate all the individuals with a common purpose, with reference to which color or nationality has nothing to do. If color or nationality has anything to do with social affinities, non-proscriptive schools will not affect their natural and healthy influences. . . .
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> The class distinctions perpetuated and taught by class schools infuse a detrimental influence into politics. Black men, no less than white men, should differ on public questions. But such difference cannot show itself in political action to any great extent as long as there is perpetuated a distinction so fundamental between the white man and the black as that the children of the latter cannot go to school with those of the former. In such a case class interests will predominate over those interests which are more general and less personal.[181]

Debate began in the Senate on Sumner's bill on January 27, 1874. A number of Senators had doubts about the constitutionality of various provisions. Ferry of Connecticut and Morrill of Maine once again reiterated their belief that the bill was unconstitutional, before it was referred to the Judiciary Committee.[182] On March 11, 1874, while the bill was under consideration, Sumner died. His last wish was the passage of his civil rights bill.[183]

Frelinghuysen reported the bill for the Judiciary Committee, and narrowed its constitutional basis to the equal protection clause of the fourteenth amendment. He thrice stated that the "bill therefore properly

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[181] *Id.* at 1313-14.

[182] *Id.* at 945-51. See also Senator Thurman's assertion that the bill was unconstitutional. *Id.* at 3455.

[183] *Id.* at 4786. See also 3 CONG. REC. 952 (1875) (remarks of Congressman Thomas Whitehead).

secures equal rights to the white as well as the colored race."[184] When Frelinghuysen turned to the school clause, he supported it on the ground that institutions "which are supported by the taxation of all, should be subject to the equal use of all. Subjecting to taxation is a guarantee of the right to use." He added:

> Uniform discrimination may be made in schools and institutions of learning and benevolence on account of age, sex, morals, preparatory qualifications, health, and the like. But the son of the poorest Irishman in the land . . . shall have as good a place in our schools as the son of the chief man of the parish. The old blind Italian, who comes otherwise within the regulations of an asylum for the blind supported by taxation, shall have as good a right to its relief as if he were an American born. There is but one idea in the bill and that is: The equality of races before the law.[185]

Frelinghuysen then turned to the question of "whether this bill admits of the classification of races in the common-school system; that is, having one school for white and another for colored children." He first read to the Senate from the decision in *Clark v. Board of Directors*.[186] In this case, a Negro child had demanded the right to attend a neighborhood school, and the local school board said that it had discretion to refuse admission thereto, and to require her to go to a central separate colored school in accordance with local sentiment. However, the Iowa Supreme Court held that the board had no such discretion under Iowa law, and had to admit her to the neighborhood school. He then quoted from the decision in *State v. McCann*,[187] in which the Ohio Supreme Court had held that state school segregation statutes do not violate the fourteenth amendment. Frelinghuysen then explained:

> The constitution and laws of Iowa provide for the "education of all the youths of the State without distinction of color." In Ohio the statute expressly provided for separate schools for white and colored children. Therefore the decisions of those courts afford no precedent for the construction of this bill when enacted. The language of this bill secures full and equal privi-

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[184] 2 CONG. REC. 3451 (1874).

[185] *Id.* at 3452. However, shortly thereafter Frelinghuysen inconsistently moved to restrict the benefits of the bill to citizens because 'I do not think that a person merely landing in this country is entitled, as a matter of right, to the benefit of our schools, which are supported by taxation" although the Equal Protection Clause covers all "persons," and not merely citizens, who are covered by the Privileges and Immunities Clause. See *id.* at 4081.

[186] Clark v. Board of Directors, 24 Iowa 266 (1868).

[187] State v. McCann, 21 Ohio St. 198 (1872).

leges in the schools, subject to laws which do not discriminate as to color. . . .

. . . .

The bill does not permit the exclusion of one from a public school on account of his nationality alone.

The object of the bill is to destroy, not to recognize, the distinctions of race.

When in a school district there are two schools, and the white children choose to go to one and the colored to the other, there is nothing in this bill that prevents their doing so.

And this bill being a law, such a voluntary division would not in any way invalidate an assessment for taxes to support such schools.

And let me say that from statements made to me by colored Representatives in the other House, I believe that this voluntary division into separate schools would often be the solution of difficulty in communities where there still lingers a prejudice against a colored boy, . . . because of his blood.

The colored race have in the last ten years manifested such noble and amiable qualities, judiciously adapting themselves to the demands of their peculiar position, that we should not hesitate to believe that they will in the future conciliate and remove rather than provoke unworthy prejudices; and there is nothing in this law which would affect the legality of schools which were voluntarily thus arranged, one for the white and the other for the colored children. . . .

. . . .

If it be asked what is the objection to classification by race, separate schools for colored children, I reply, that question can best be answered by the person who proposes it asking himself what would be the objection in his mind to his children being excluded from the public schools that he was taxed to support on account of their supposed inferiority of race.

The objection to such a law in its effect on the subjects of it is that it is an enactment of personal degradation.

The objection to such a law on our part is that it would be legislation in violation of the fundamental principles of the nation.

The objection to the law in its effect on society is that "a community is seldom more just than its laws;" and it would be perpetuating that lingering prejudice growing out of a race having been slaves which it is as much our duty to remove as it was to abolish slavery.

Then, too, we know that if we establish separate schools for colored people, those schools will be inferior to those for the whites. The whites are and will be the dominant race and rule society. The value of the principle of equality in government is that thereby the strength of the strong inures to the benefit of the weak, the wealth of the rich to the relief of the poor, and the influence of the great to the protection of the lowly. It makes

> the fabric of society a unit, so that the humbler portions cannot suffer without the more splendid parts being injured and defaced. This is protection to those who need it.[188]

Frelinghuysen then went on to justify the constitutionality of school regulation by Congress under (1) the principles of the three reconstruction amendments lumped together with recent history, (2) the privileges and immunities clause of the fourteenth amendment, and (3) the equal protection clause.[189] He conceded that "it is not one of the privileges of a citizen of the United States to have any education in a State; that a State may abolish all its schools." However, he contended that it was one of the privileges of national citizenship "not to be discriminated against on account of race or color by the law of a State relating to . . . schools. . . ." He asserted that excluding a child from school solely because he was of German or African descent "would violate his privileges as a citizen of the United States." Frelinghuysen also contended that the privileges and immunities clause went further than the old interstate privileges and immunities clause of article IV, section 2,[190] although Congressman John A. Bingham, the Radical Republican lawyer from Ohio who drafted the clause, stated that the fourteenth amendment clause did not go any further and was solely designed to give Congress power to enforce the original constitutional provision.[191] Frelinghuysen also failed to notice that his construction of the privileges and immunities clause would have invalidated the widespread and long-standing school laws requiring residence of children in the district.[192]

Several days later, Senator Thomas M. Norwood, a Georgia Democrat, delivered a long harangue during which he, too, raised the point that the rich children could be sent to private schools while poor children, under the bill, must choose either integration or ignorance.[193] He sarcastically identified the war power as the source of Congress' power to "declare war between white children and black children in the public schools," and since "the power to make war necessarily carries with it the power to destroy, Congress can go further and even

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[188] 2 CONG. REC. 3452 (1874).

[189] *Id.* at 3453.

[190] *Id.* at 3454.

[191] H.R. Rep. No. 22, 41st Cong., 3d Sess. 1 (1871):

> The clause of the fourteenth amendment, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," does not, in the opinion of the committee, refer to privileges and immunities of citizens of the United States other than those privileges and immunities embraced in the original text of the Constitution, article 4, section 2.

[192] See cases cited note 143 *supra*.

[193] 2 CONG. REC. app. 237 (1874).

destroy the public schools!"[194] Ultimately, he became serious and made a long argument that the right to go to school was not protected under the privileges and immunities clause.[195]

On May 20, when the Senate resumed consideration of the civil rights bill, Senator Daniel W. Pratt, a Republican lawyer from Indiana, explained his support of the school clause as follows:

> But the chief objection is to allowing what are called mixed schools. In the first place, this bill does not necessarily lead to that, especially in the large cities, where colored people abound. In this city, for example, the schools are kept separate and will continue to be, though this bill become a law. Where the colored people are numerous enough to have separate schools of their own, they would probably prefer their children should be educated by themselves, and there is nothing in this bill which prohibits this. But in the villages and country separate schools will be impracticable, and the colored children, if educated at all in public schools, must necessarily be where the great majority of the children are white. There may be but one or two colored families in the district, and I admit that here the question must be fairly met whether they shall share or be excluded from the benefits of the public schools.
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> In the first place, if not allowed, they must remain uneducated; a thing to be avoided, since these children will one day be voters, and policy requires they should be intelligent voters. In the next place, there is no more reason or justice why they should be excluded than an equal number of white children, for their father as a citizen has been taxed to build the school-house and to maintain the school. And, lastly, there is precisely the same reason his children should receive a rudimentary education at the common school that there is for white children. Beyond all this, what becomes of the colored man's rights as a citizen if this discrimination shall operate against him in a point where a parent's heart is most sensitive, to exclude his children from drinking at the common fount of knowledge.[196]

Pratt added that opposition to school integration would evaporate when the law was passed.[197]

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[194] *Id.* at 238.

[195] *Id.* at 239-44.

[196] 2 CONG. REC. 4082 (1874).

[197] *Id.* at 4083. He said:

It is said such a law as this bill enacts will be so odious that it cannot be executed. The objection assumes what I deny is true, that it will be generally odious. . . . It will be odious only in particular sections of the country, for in many parts their rights and privileges as set out in this bill are now recognized. In one State the practice of mixed schools has always been the rule, and in several of the Southern States the rule has been established by

Thurman, an implacable Democratic foe of the bill, arose to answer Pratt. After an extensive analysis of the privileges and immunities clause designed to demonstrate that the bill was unconstitutional,[198] he asserted that if Pratt "has understood this first section as allowing the State of Indiana to provide by law that the children of colored people and of white people shall be educated in different schools, [he] is entirely mistaken." Thurman then quoted extensively from the *McCann* decision of the Ohio Supreme Court, "composed of five eminent republicans," to the effect that school segregation laws did not violate the fourteenth amendment. He added that since "the exclusion of colored children from white schools is not a violation of the fourteenth amendment, then you have no right to punish such exclusion." He concluded by observing that whites paid almost all of the school taxes, and issued the stock dire warning about school closing if the bill were passed.[199] The next day, Senator John W. Johnston, a Virginia Democratic lawyer, told the Senate of the great progress the Democratic administration of his state had made in building up a school system, that colored school facilities were equal to those of white schools, that neither party wanted school integration, and if it came the school system would be destroyed.[200]

Morton spoke next. He first stated that the words "the equal protection of the laws" in the fourteenth amendment "means to the equal benefit of the laws" because the "whole body of the law is for protection in some form—the definition and protection of the rights of person and property. . . ."[201] He then got into a colloquy with Senator Augustus S. Merrimon, a North Carolina Democratic lawyer, who asked him whether a person, by virtue of United States citizenship, had the "right to attend a particular class of schools," and whether a state could require that females be educated separately from males:

> Mr. MORTON. . . . [T]his phrase, "nor shall any State deny to any person within its jurisdiction the equal protection of the laws," denies to any State the power to make a discrimination against any class of men as a class. . . . it denies the power to exclude them from schools because they are negroes . . . . The question of separating males and females into different schools does not come within the principle at all. The great object of

State laws. Pass this bill and all opposition will cease in a few months, when it is known that the question is settled; for people will come to see that the law is supported by reason and justice, and that free government demands the abolition of all distinctions founded on color and race.

[198] *Id.* at 4085-88.

[199] *Id.* at 4088-90.

[200] *Id.* at 4114-15.

[201] 2 CONG. REC. app. 358 (1874).

> the fourteenth amendment was to establish the equality of races, equality before the law. The separation of the sexes, putting male children into one school and females into another, does not violate that principle, provided it extends to all races. . . . The power of the States to establish different grades of schools . . . remains just as it was, with this difference, that the power to discriminate between races is taken away. The States are not bound to establish common schools; but if the States do establish common schools to be supported at public expense, they cannot exclude the children of any race from those schools. . . . They may say if they please—perhaps that is an extreme case—that none but male children shall attend; but they must be the males of all races. I will not go that far, but the law may say that no child shall attend a common school, if you please, over sixteen years of age.
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> Mr. MERRIMON. Why do you use the word "races?" . . . The point I make is this: the Constitution does not say anything about "races" except in certain respects. . . . there is no such expression touching distinctions as to race in any other respect whatsoever.
>
> Mr. MORTON. The Constitution in effect does say so. It says that no person shall be denied the equal protection of the laws; and if common schools are established and the children of colored men are excluded from those schools, I ask my friend—and he cannot deny it for a moment—if they are not denied the equal protection of the laws?
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> Mr. MERRIMON. I say they are not, if like provision is made for the education of colored children that is made for white children."[202]

Merrimon then pressed Morton as to whether segregation of Chinese or Indian students was constitutional. Morton replied that it is a violation of the fourteenth amendment to exclude colored children from schools entirely. Merrimon said that he admitted this, but reiterated that states could provide separate and equal facilities and segregate by race or sex. Morton answered that when Merrimon "concedes that the exclusion of colored children from schools is a violation of the fourteenth amendment, it occurs to me that he has conceded all that we can ask." Merrimon continued to press his segregation point as follows:

> Mr. MERRIMON. . . . I say that the State Legislature cannot pass a law providing that white children should be educated and that colored children should not be, because that would deny the equal protection of the laws. But when it affords the same provision, the same measure, the same character for the colored race that it afforded for the white race, there is no

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[202] *Id.* at 359.

more discrimination against one race than there is against the other; and therefore it is competent for the Legislature to do it, there being no restriction on such a power in the Constitution of the United States.

Mr. MORTON. My friend's argument then comes to this, that under the fourteenth amendment the State must make equal provision for the children of both races, and if there be any inequality in the benefits, then it is a violation of the fourteenth amendment. It brings him down then to the possibility of making separate and distinct schools precisely equal in point of benefit.[203]

Morton then completely ignored the segregation question and reiterated that colored children could not be denied the equal benefits of the school system. In spite of Merrimon's persistent questioning on the point, he studiously avoided discussing segregation at all.[204]

Senator George S. Boutwell, a Massachusetts Radical Republican, then offered an amendment to strike from the Judiciary Committee draft the provision that all persons "shall be entitled to the full and equal enjoyment . . . of common schools," and insert "of every common school and public institution of learning or benevolence . . . that may hereafter be endowed by any State, or supported . . . by public taxation."[205] He supported the school clause based on the privileges and immunities clause, and disagreed with the decision in the *Slaughter-House Cases*. He also said he was offering his amendment because the committee draft left it in doubt as to how far school segregation was permitted. He wanted to forbid it entirely, saying:

A system of public instruction supported by general taxation is security, first, for the prevalence and continuance of those ideas of equality which lead every human being to recognize every other human being as an equal in all natural and political rights; and the only way by which those ideas can be made universal is to bring together in public schools, during the forming period of life, the children of all classes, and educate them together.

The public school is an epitome of life, and in it children are taught so that they understand those relations and conditions of life which, if not acquired in childhood and youth, are not likely afterward to be gained. To say, as is the construction placed upon so much of this bill as I propose to strike out, that equal facilities shall be given in different schools, is to rob your system of public instruction of that quality by which our people, without regard to race or color, shall be assimilated in ideas,

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[203] *Ibid.*

[204] *Id.* at 359-61.

[205] 2 CONG. REC. 4115 (1874). See also *id.* at 3570.

> personal, political, and public, so that when they arrive at the period of manhood they shall act together upon public questions with ideas formed under the same influences and directed to the same general results; and therefore, I say, if it were possible, as in the large cities it is possible, to establish separate schools for black children and for white children, it is in the highest degree inexpedient to either establish or tolerate such schools.
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> The theory of human equality cannot be taught in families; . . . but in the public school, where children of all classes and conditions are brought together, this doctrine of human equality can be taught, and it is the chief means of securing the perpetuity of republican institutions. And inasmuch as we have in this country four million colored people, I assume that it is a public duty that they and the white people of the country, with whom they are to be associated in political and public affairs, shall be assimilated and made one in the fundamental idea of human equality. Therefore, where it would be possible to establish distinct schools, I am against it as a matter of public policy.
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> But throughout the larger part of the South it is not possible to establish separate schools for black children and for white children, that will furnish means of education suited to the wants of either class; and therefore in all that region of country it is a necessity that the schools shall be mixed, in order that they shall be of sufficient size to make them useful in the highest degree; and it is also important that they should be mixed schools in order that, when the prejudice which now pervades portions of our people shall be rooted out by the power of general taxation, they will be able to accumulate in every district those educational forces by which the public schools shall be made useful to the highest degree for which there is capacity in the public will with the power of general taxation.[206]

Senator John P. Stockton, a New Jersey Democratic lawyer whose expulsion or exclusion from the 39th Congress gave the Republicans the necessary two-thirds majority to override President Andrew Johnson's vetoes, ended the day's proceedings with a plea for local control over schools. He told his colleague, Frelinghuysen, to go to the New Jersey legislature if he wanted to regulate schools, and added that the state legislature would never pass a bill like this.[207]

The next day, May 22, was the last day of Senate debate. Stockton finished his speech by reading from a statement by Senator William G. Brownlow, a Tennessee Republican, attacking school integration. He added that Boutwell's speech contained the same ideas as those urged by Sumner and by sundry Negro conventions, that Negroes were entitled not merely to equal schools but to go to the same schools as

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[206] *Id.* at 4116.

[207] *Id.* at 4117.

white children in order "that this miserable prejudice that existed should be rooted out of the hearts of the young as they grow up."[208] He, too, warned that the bill would destroy the school system.[209]

Howe then commenced a speech in support of the bill. Like Boutwell, he differed with the Supreme Court's restricted interpretation of the privileges and immunities clause of the fourteenth amendment in the *Slaughter-House Cases*.[210] He asserted that, in Georgia, school districts could give Negroes inferior schooling or none at all,[211] and spurned the threats of school-closing.[212] But he declared:

> Mr. President, we are not providing in this bill for mixing colors at all. If you are resolved that the two colors shall not mingle in your school-houses, . . . they need not mingle, in spite of anything in this bill. I do not agree with my honorable friend from Massachusetts, [Mr. Boutwell] who said yesterday that it was necessary to mingle them, if I understood him, in the school-houses, in order that they might there unlearn this prejudice which separates one color from the other. I do not believe in that doctrine at all. I do not believe that it belongs to education to unteach this prejudice. . . .
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> Mr. President, I say if you insist upon it that the colors shall never be mingled in your school-houses, this bill will not force them together. If you choose to build two school houses on every acre in every district, and to give the two colors the privilege of choosing between the two, each color will go to that where they feel the most at home and where their education is most advanced. Open two school-houses wherever you please; furnish in them equal accommodations and equal instruction, and the whites will for a time go by themselves, and the colored children will go by themselves for the same reason, because each will feel more at home by themselves than at present either can feel with the other; and the child who should separate from his own color to go into the white school for mere social reasons would feel and would be treated by his own color as a rebel against his race. But, on the contrary, let your law say that they shall not be educated together, and then the subordinate

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[208] *Id.* at 4144.

[209] *Id.* at 4145.

[210] *Id.* at 4148.

[211] *Id.* at 4150.

[212] *Id.* at 4151. Senator Howe said:

> But Senators say, "Let us be careful; do not go too far; . . . do not you dare to say that the colors in those schools be mixed; say that and the schools fall; there shall be none." I hear the threat, and I admit I am afraid. I do not know but they will do it. . . . This [threat] is one that comes very near me. I do not know but the schools will fall if we do not stay our course; but when peril threatens of any kind I can meet it but in one way. Let justice be done though the common schools and the very heavens fall.

> color must take just such accommodations as are provided, let them be poor or good. Let the law speak, then; offer equal inducements to each of the races, and each will in the schoolhouse continue to keep by themselves. But let the individuals and not the superintendent of schools judge of the comparative merits of the schools; that is the point. They will know where they are best taken care of. I would rather trust them than to trust any municipal officer.[213]

Howe also asserted that little children are not prejudiced, and that they are color-blind until taught prejudice.[214]

Alcorn, who had consistently spoke and voted against Sumner's bill in the prior Congress,[215] now advocated it. He said that "I am not in favor of mixing [schools] and I contend that this bill does not mix them." He explained that in Mississippi the Negroes controlled the whole government, "Yet there is not a mixed school in the State of Mississippi, and we have civil rights there." He added that the colored people "believe the interests of both races will be promoted by keeping the schools separate," and that a satisfactory segregated school system was in operation which gave every citizen "a right to send your child to any school you choose," but that children of both races were, by the choice of their parents, sent to segregated schools. He urged the bill because in some states Negroes had no right to go to any school.[216] Alcorn concluded by accusing Boutwell of hypocrisy in a proposed amendment limiting schools covered to those "hereafter" established, contending that he wanted to bar them from the old Massachusetts colleges. He said that Negroes demanded the right of admission to all schools, and if refused on constitutional grounds they will "trample down constitutions." His conclusion made it clear that he had changed his position because his colored constituents demanded it.[217]

Boutwell replied to this that a college, such as Dartmouth College,

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[213] *Ibid.*

[214] *Ibid.* He said:

> They are not the laws of nature. Nature gives the lie to the assertion everywhere. There is not in Washington a white child, until politics gets possession of the unfortunate to some extent, that makes the slightest discrimination between the black and the white race; not one. Politicians teach that prejudice. It is not a law of nature; it is one of the worst and most degrading lessons we learn, and one of the most mischievous.

[215] CONG. GLOBE, 42d Cong., 2d Sess. 274, 3264, 3268, 3270 (1872).

[216] 2 CONG. REC. app. 305 (1874).

[217] *Id.* at 307. He said: "The colored people of my State demand the passage of this bill. I yield to that demand. My refusal would excite them to anger; they would keenly feel the injustice and wrong. I bend gracefully to their will." His mind may have been changed by the fact that he was an unsuccessful candidate for governor in 1873, in between the last Congress and this one.

which was founded by a private person, could not be required to integrate even if it later received gifts from the state, citing *Dartmouth College v. Woodward*,[218] because it "takes its law from the founder of the institution . . . and all subsequent gifts and bequests are upon that foundation, and, as a matter of law, follow the will of the founder, even though the subsequent gifts may greatly exceed the original one." He said that Congress could only reach institutions originally endowed from state money, or subsequently endowed or supported out of tax money. Boutwell concluded:

> To say that an institution private in its foundation and receiving its law from the founder, though it may have afterwards received a donation or a gift from a State, shall be open to every citizen for the purposes of education, is going further than I think we can go under the principles of law and according to the decisions of the Supreme Court.[219]

But Alcorn was not satisfied. He said that the United States Constitution could impair state contracts and charters, and demanded admission to Dartmouth College for Negroes.[220]

Senator Lewis Bogy, a Missouri Democratic lawyer, likewise referred to Boutwell's amendment as an illustration or northern hypocrisy.[221] He, too, predicted that his state would repeal its school laws if the bill were passed, that the school system would be destroyed, and that rich white children would be sent to private school while poor whites and Negroes would go without education.[222] But Senator Henry R. Pease, Alcorn's Republican colleague from Mississippi, told the Senate that none of the southern states would abolish their school system if the bill passed because labor would leave without a school system and this was against their interests.[223] He noted that by law in Mississippi Negroes could enter any school but chose to have segregated schools. He said that not a single Negro had applied to Oxford University (now the University of Mississippi) although entitled to do so, but instead

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218Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

2192 Cong. Rec. 4152 (1874).

220*Id.* at 4152-53.

2212 Cong. Rec. app. 320-21 (1874). He said:

> While northern Senators are determined that the southern people shall associate with their colored neighbors, and that the blacks shall be admitted to the schools of the country, . . . on an equal footing with the whites they are unwilling that they should enter the halls of learning at the North; they are unwilling to do that for them at home which they compel us to do for them in our homes.

222*Id.* at 321-22.

2232 Cong. Rec. 4153 (1874).

asked to have a colored university set up, which was done. He also stated that he opposed Boutwell's amendment because he wanted Negroes to have the right to go to Harvard and Dartmouth. He added:

> Gentlemen say that if equal advantages in separate schools are provided the law is met so far as privileges and immunities are concerned. I say that whenever a State shall legislate that the races shall be separated, and that legislation is based upon color or race, there is a distinction made; it is a distinction the intent of which is to foster a concomitant of slavery and to degrade him. The colored man understands and appreciates his former condition; and when laws are passed that say that "because you are a black man you shall have a separate school," he looks upon that, and justly, as tending to degrade him. There is no equality in that.[224]

Senator Henry Cooper, a Tennessee Democratic lawyer, also attacked the school clause. He said that the committee draft, unlike the original bill, was ambiguous on whether the states could maintain a system of segregated schools. He urged that no benefit was gained by Negroes in forcing themselves into white schools where there would be prejudice against them. He, too, concluded that Tennessee would close its schools if the bill were passed.[225]

Saulsbury of Delaware made the next assault on the school clause. After attacking Boutwell's view that segregated schools should be abolished to root out prejudice, and "that children are to be forced into the same school in order that their ideas and views and opinions may become one," he declared:

> [E]very Senator on this floor who favors the bill knows, that the only effect and operation of it is to be had upon the poorer classes in this country, who are dependent upon common schools. While that Senator and the Senators who support this bill advocate mixed schools, and insist that it is the right of the colored man to send his children to the same school with the white man, there is not one of them—I repeat in the presence of Senators, there is not one of them—who will send his children to any such mixed school. . . . Ah, sir, fortune has favored them, and they are able to select their schools and send their children to them and pay for their tuition; but the humble poor man . . . it is against them and their children that the provisions of this bill are directed. We had as well deal frankly with this question. I know full well that in no section of this country are mixed common schools patronized by gentlemen of fortune. They select their schools, and Senators know full well that if

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[224] *Id.* at 4154.

[225] *Id.* at 4154-55.

> this bill goes into operation it will not affect their children, while they are avowing their purpose to force the mixed schools whereby the children of the poor white men may be compelled to be educated in associations with the colored children or not educated at all.[226]

Saulsbury predicted that school integration would produce miscegenation,[227] and the destruction of southern and border-state school systems, which would intensify white prejudice against Negroes rather than alleviate it.[228]

With the Senate going into an all-night session to force passage of the bill, Senator James K. Kelly, an Oregon Democratic lawyer, attacked it on constitutional grounds. Once again, he explained the limited nature of the privileges and immunities clause, and prophesied that "if the States should abolish the common schools, the Federal Government would undertake to coerce the people of the States, to levy taxes to support common schools."[229] Merrimon's contribution to the Democratic filibuster consisted of a rambling discourse which ended with a lengthy analysis of the limited scope of the privileges and immunities and equal protection clauses.[230] He returned to his analogy between segregation by race and segregation by sex in the schools, and noted that Morton was unable to say why one was permitted and the other forbidden. He contended that equal protection was preserved when separate schools were provided for both classes, and that the fourteenth amendment did not mention race any more than sex, and either permitted both types of segregation or neither.[231] He added:

> Will it be said the Negro child has not the right to go to a white school? Then I answer, the white child has no right to go to the Negro school. It is as broad one way as it is the other,

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[226] *Id.* at 4158.

[227] *Id.* at 4160.

[228] *Id.* at 4161. See also 3 CONG. REC. app. 105 (1875) (remarks of Senator Thomas F. Bayard).

[229] 2 CONG. REC. 4162-64 (1874).

[230] 2 CONG. REC. app. 311-13 (1874).

[231] *Id.* at 313. He said:

> Will it be said that because the difference is on account of color it will not do? That objection is unfounded, it seems to me. There is no provision in the Constitution of the United States which protects color any more than sex or age. If there was any purpose to protect *color* against the exercise of the police power of the States, and prevent the States from exercising their powers to regulate right and society, why was it not so provided? Are the States to be deprived of the absolute right to exercise the important power of police upon the merest speculative inference? Surely not. That it was not contemplated that any such restriction on the States was thought of,

> and the principle in this case does not differ from the principle in the case where a law provides that males shall be educated only in male schools and females only in female schools. I cannot understand or comprehend a distinction in point of principle between the power to educate the sexes in separate schools and that to require the races to be educated in separate schools. Like equal legal provision must be made for each race, and this is the equality of right and protection required by the Constitution. The State may exercise the power to distinguish on the ground of race, so as to provide for the education of the races in separate schools equally provided for in all material respects. But, even apart from the police powers, I cannot see wherein one man is injured and deprived of any right in the one case more than he is in the other.[232]

Merrimon, too, accused the Republican majority of hypocrisy.[233] He

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intended, or provided, appears in the provision contained in the fifteenth amendment, that no person shall be deprived by the United States, or any State of his right *to vote* on account of *race, color, or previous condition of servitude.* Why was this provision limited to the right to *vote* alone? . . . . It was easy to have provided that no distinction for any cause should ever be made because of *race, color, or previous condition of servitude,* but no such provision was made.

[232]*Ibid.* He also observed:

But it is said that these police powers may be exercised in many respects, but it cannot be done in the matter of color. Why not in the matter of color? If the Legislature of a State, in their judgment founded on the experience of the people, think and determine that the black race and the white race should be educated separately, why is it not competent for them so to provide by statute? It is said it is a discrimination against the black race. It is just as much a discrimination, in point of principle, against the white race. If there are separate schools, the black man has the same right to deny my child admission to the school where his children go as I have to deny his children admission to the schools where my children go; so that we are upon a perfect equality of right in principle.

The Senator from Wisconsin [Mr. Howe] to-day declaimed loudly against the proposition of the minority here and of the people in certain States, as tending to deprive the colored people of education. He talked about shutting the door in their faces, keeping them locked up in ignorance indefinitely or forever. Nobody has made any such uncharitable proposition. . . . The proposition is to allow the colored people of the country to have their own school-house; to allow the white people to have their own school-house, and that neither race shall interfere with the other. . . .

Id. at 315.

[233]*Id.* at 317. He said:

I venture to say that any one may go to the Senators who expect to vote for this bill and put the plain, practical question to them . . . "Are you willing your daughter shall attend a school with the negro children in my town?" And if he would give you a sincere answer he would tell you "nay," and yet he would have his fellow-countrymen do what he would not do himself.

ended his declamation with a warning against miscegenation and school closing.[234]

With the Republicans still refusing to adjourn at 1:30 a.m.,[235] Senator William T. Hamilton, a Maryland Democratic lawyer, began a lengthy discussion of the bill. He first asserted that its constitutionality could not be justified under the fourteenth amendment, since that amendment said nothing about race, and if Congress could forbid racial discrimination thereunder, it could forbid other kinds of discrimination as well.[236] He advocated segregated schools, and declared that mixed schools would lead to racial strife. He, too, predicted that Maryland would close its schools rather than submit to integration.[237]

At this point, Senator Aaron A. Sargent, a California Republican lawyer, moved the following amendment:

> *Provided,* That nothing herein contained shall be construed to prohibit any State or school district from providing separate schools for persons of different sex or color, where such separate schools are equal in all respects to others of the same grade established by such authority, and supported by an equal *pro rata* expenditure of school funds.[238]

A vote was taken on this amendment and it lost, 26 nay to 21 yea. The armative votes were cast by 13 Democrats, 1 southern Republican, and 7 northern Republicans, from California, Illinois, Iowa, Maine, Nevada, Pennsylvania, and West Virginia. Included in the affirmative votes were those of Morrill of Maine, who had always voted against Sumner's bill, Senator William M. Stewart, a Nevada Republican lawyer who had voted for the fourteenth amendment and who was a prominent Radical throughout the whole reconstruction period, and Senator William B. Allison, an Iowa Republican lawyer who, as a member of the House in the 39th Congress, had voted for the fourteenth amendment on its

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[234] *Id.* at 316-18.

[235] 2 CONG. REC. 4166 (1874).

[236] 2 CONG. REC. app. 362 (1874).

[237] *Id.* at 367-69. He said:

> I do not want the sentiments and principles enunciated by the Senator from Massachusetts [Mr. Boutwell] to be applied to our people and forced upon us. The policy of forcing mixed schools upon us, of forcing our children into schools with colored children, is publicly avowed. There is to be no choice. If desired by neither race it must still be done, says the Senator, to perpetuate or establish a principle. I care not whether it be right or wrong in sentiment, whether it should or should not be done as a matter of principle; I say as a matter of policy and or philosophy the men who would do this are blind to the intent of both races.

Id. at 368.

[238] 2 CONG. REC. 4167 (1874). See also *id.* at 4153.

passage. The negative votes were cast by 19 northern Republicans and 7 southern Republicans. Three of these had voted for the fourteenth amendment as members of the Senate and 5 as members of the House. Frelinghuysen, Howe, and Pratt, all of whom said that a dual school system and voluntary segregation were permissible at the least voted in the negative, so apparently Sargent's amendment must have been construed as permitting compulsory segregation by law.[239]

Boutwell then moved his amendment, and Stewart opposed it. He said that now that Negroes could vote, they could look out for themselves, and pointed to the votes for the civil rights bill in the Senate as the effect of Negro suffrage. He said that while Congress could constitutionally compel the states to repeal their segregation laws, it was inexpedient to do so because some of them had fledgling school systems which might be ruined by the bill. Frelinghuysen then said that he would vote against Boutwell's amendment because the Judiciary Committee draft, without the defeated amendment of Sargent, "leaves the schools, colored schools or white schools, as they are." Frelinghuysen explained that "it is perfectly competent to have one school for the whites to go to, another school for the colored children to go to; and I suppose by the law as it stands a colored child has a right to go to a white school, or a white child to go to a colored school," and that "it would not be a violation of the law [to provide separate school systems]."[240]

Boutwell then explained his amendment as follows:

> What e [sic] feared is just exactly that condition of things which the honorablI [sic] chairman of the Committee on the Judiciary intimates may happen. I wish to break down the prejudice in the public mind by which it is possible in some cities and sections of the country to make separate schools and give to children, who when they become men are bound by the same political bonds to a government based upon the doctrine of equality, ideas which are inconsistent with the existence of such institutions; for it is only by instilling into the minds of the children and the youth of the country the idea that there is no difference by nature or birth or race or color or caste, that we can take security for the continuance of the institutions under which we live; and every system which tolerates, encourages, or lays the foundation for the dissemination of different ideas, is a system hostile to republican government. Inasmuch as these four million colored people are made, by the Constitution, citizens of the country, as they and their posterity through all time are to have a lot and part with us as citizens, I say now . . . let us do that thing which is right in

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[239] *Id.* at 4167.

[240] *Id.* at 4167-68.

> the eye of the Constitution; and nothing is right but absolute equality of rights.[241]

Frelinghuysen then asked Boutwell whether "he proposes by his amendment to compel colored children to go to white schools." The latter replied that he could not do this, but that he intended to eliminate a dual school system. Stewart rebutted Boutwell's assertion "that it is necessary now, in order to preserve the Republic, to require the children of colored people and white people to go to the same school, whether they desire it or not, and that we should not leave it optional even with them to separate themselves, but must force them into the same school, and this for accomplishing of a great moral idea." Stewart warned his Republican colleagues that in many of the states a free school system was not firmly established, and that integration might create so much opposition as to destroy it. He concluded that he was not going to surrender to the Negro vote at the expense of education.[242]

Under questioning by Stockton, Boutwell reiterated that the purpose of his amendment was not to eliminate all distinctions of race and color "but to remove the prejudices which exist between persons of different races and different colors, and substitute the idea of human equality." Frelinghuysen said that he disagreed with this. A vote was then taken on Boutwell's amendment. Five votes were cast in its favor, 1 by Boutwell and 4 by Republican Senators from Alabama, Louisiana, Mississippi, and South Carolina. Each of these states had heavy Negro voting populations. Forty-two votes were cast against the amendment. Thirteen were Democrats, 4 were southern Republicans, and 25 were northern Republicans. This last group included five Republicans who had voted for the fourteenth amendment as members of the Senate, and five as members of the House, including Senator Roscoe Conkling, an erstwhile colleague of Boutwell on the Joint Committee on Reconstruction which had reported out the fourteenth amendment. Even Senator William B. Washburn, a Republican colleague of Boutwell from Mas-

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[241] *Id.* at 4168.

[242] *Id.* at 4168-69. Senator Stewart said:

> My friend from Massachusetts knows how our ranks have been augmented since that event [fifteenth amendment] for he acted a conspicuous part in giving the ballot to the negro. He knows very well how the forces that advocate these rights have been augmented by the ballot. He hears that potent voice. Eight hundred thousand votes in America are calculated to make the politicians tremble. . . . If for education, then the amendment of the Senator from California is right; if to conciliate eight hundred thousand voters at the expense of the loss of education in many States, then the amendment of the Senator from Massachusetts is right. . . . I do not believe that but for these eight hundred thousand votes there would be ten votes, or even five votes, in this Chamber for this particular clause.

sachusetts who had, as a member of the House, voted for the fourteenth amendment on its pasage there, voted against his proposal to abolish a dual school system.[243]

A vote was then taken to strike out the whole school clause, and it lost by a strict party-line vote of 30 to 14, with only Boreman voting with the minority.[244] Next, Alcorn moved to amend the committee draft to include colleges which had received state endowments. This provision was opposed by Frelinghuysen because a state, "by making an endowment to an institution . . . [could not] change it from a private to a public institution."[245] Nine Republican senators voted for this—7 from the south and 2 from the north. Thirty-seven senators voted against it—13 Democrats, 2 southern Republicans, and 22 northern Republicans, including Boutwell. All of the Republicans who had voted for the fourteenth amendment to the Senate or House voted against this.[246]

Sargent then proposed an amendment to give Negroes the equal benefit of the school system, and the following colloquy occurred:

> Mr. EDMUNDS. . . . The whole effect of this proposition is to authorize States on account of color to deny the right . . . to go to a particular common school. If there is anything in the bill, it is exactly contrary to that. If there is anything in the fourteenth amendment it is exactly opposite to that. The fourteenth amendment does not authorize us to make any trades with States either way on the subject, or regulate the action of States. What the Constitution authorizes us to do is to enforce equality; and it is not half-equality, for there is no such thing as half-equality. It is entire equality or nothing at all. . . . To put in these words here or in any part of the bill is merely to say in substance and effect that this bill shall have no force in asserting the equality that the fourteenth amendment to the Constitution asserts, if that asserts any equality at all; and, of course the bill goes on the theory that it does. . . .
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> Mr. SARGENT. I do not know that the fourteenth amendment enjoins upon us that we shall have mixed schools. I do not know that the fourteenth amendment performs any of the offices the Senator speaks of. . . . I doubt if the fourteenth amendment provides that females shall be intruded into male schools or males into female schools; and yet this would be the office of the fourteenth amendment under the logic of the Senator from Vermont.[247]

Sargent next said that a powerful and wealthy religious organization

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[243] *Id.* at 4169.
[244] *Id.* at 4170.
[245] *Id.* at 4168.
[246] *Id.* at 4171.
[247] *Id.* at 4171-72.

was at work to undermine the public school systems of the states, and that this bill would help them do it. He accused his Republican colleagues of surrendering educational welfare to the Negro vote.[248] He concluded:

> If you say that the fourteenth amendment absolutely levels all distinctions and justifies you in putting heavy penalties to prevent a system of separate schools, then I say you cannot separate your sexes; you must put them all into the same school, and the boy who demands to enter a female school has just as much right to do it under the fourteenth amendment. Following your principle, lauded here, you are required to enforce this by a law and penalties just as much as you are that a person of a particular color shall be allowed to enter into schools of another color. I would give all the full benefit of the school system, and I would do no more.[249]

Edmunds then said that Sargent had adopted the Democratic position that the fourteenth amendment does not forbid all distinctions in state laws based on race or color or religion. He emphasized: "But the Senator's argument results in exactly this: that the fourteenth amendment does not, as it respects common schools, level a distinction which a State may have a right to make on account of race and color."[250] Edmunds then stated that the bill proceeded on the theory that the fourteenth amendment does make a state blind to race, color, or origin. He added:

> [T]he Senator's argument is the democratic argument, inasmuch as he says the State has the right to regulate this business of common schools and to exclude people on account of their color one way or the other. If the State has that right, we cannot interfere with it. If the State has not that right, we cannot confer it by an act of Congress, because such an act of Congress would be in violation of the fourteenth amendment itself. The Senator's amendment proposes to recognize the right in a State to discriminate on account of color, and if it does recognize that right, it recognizes it as a right inherent in the State and which the fourteenth amendment does not

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[248] *Id.* at 4172. He said:
But by the effect of this legislation, which is insisted on here for political purposes, in order to gain the eye of the colored people and encourage them to adhere to the republican party—for that is what it amounts to, for political purposes—we are sacrificing the higher interest of the county. . . . I consider that these are more important considerations than the question whether the republican party shall have more or less of the colored vote of this country.

[249] *Ibid.*

[250] *Ibid.*

> touch. If it does not touch it, then there is not a right in your bill that is constitutional. On the other hand, if the fourteenth amendment does touch it, and this right to discriminate on account of color is not in the State, then I repeat, the Congress of the United States has no power to confer such a right upon a State to make discriminations between its citizens on account of color.[251]

Edmunds then deplored Sargent's reference to the alleged Roman Catholic Church opposition to public schools, and praised it for never having made racial discriminations. He went on to quote various statistics designed to show that southern Negroes had inferior school opportunities to those of whites, and urged the Senate to run the risk of any disturbances in the school systems which the bill might engender.[252] Three Democrats—Johnston of Virginia, Norwood of Georgia, and Merrimon of North Carolina—rebutted Edmund's assertion about inferior Negro schooling in the South.[253] Sargent replied that, as a consistent Republican, he believed that segregation by race was no more a violation of the fourteenth amendment than segregation by sex.[254] However, his amendment lost by 28 to 16. Two Republicans switched sides from the prior vote and several were absent who had originally voted with Sargent. However, Stewart continued to vote with Sargent although this amendment was less favorable to Negro claims than the prior one.[255] The bill then passed 29 to 16, with only three Republicans voting with the Democrats in the negative.[256]

The House took no action on the bill during this session. Several Democrats attacked it for requiring social equality and race mixing, asserted that Negroes themselves wanted separate schools, and issued the usual dire warnings about destruction of the school system or inevitable miscegenation.[257] A Tennessee Republican stated that almost all Negroes were satisfied with segregated schools except a few "smarties" or "would-be leaders," and questioned the constitutionality of the law.[258] Congressman James T. Rapier, an Alabama Negro Republican lawyer, charged that the Democrats were using the civil rights bill to gain

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[251] *Id.* at 4173.

[252] *Ibid.*

[253] *Id.* at 4173-75.

[254] *Id.* at 4174-75.

[255] *Id.* at 4175.

[256] *Id.* at 4176.

[257] 2 CONG. REC. app. 341-44 (1874) (remarks of Congressman William B. Read); *id.* at 417-21 (remarks of Congressman Ephraim K. Wilson); *id.* at 481 (remarks of Congressman John J. Davis).

[258] 2 CONG. REC. 4592-93 (1874) (remarks of Congressman Roderick R. Butler).

votes.[259] He denied any desire for social equality, and complained that whites wanted to shut Negroes out of schools completely.[260]

Congressman Chester B. Darrall, a Louisiana Republican, read a section of that state's constitution giving every child in the state the right to attend any public school without distinction of race or color. He noted that this provision was put into force in New Orleans over a good deal of white opposition, and opponents urged white parents to withdraw their children from school. He read a report by the president of the city board of school directors that no unfavorable results which had been freely predicted had occurred. Most students attended school with members of their own race, but in some instances where schools became mixed there was no difficulty. In one school, where white students were withdrawn in protest, they soon returned. Representative Darrall declared that since the law had gone into effect, the school system of Louisiana had increased and flourished and that many prominent white people now endorsed the non-discriminatory school system. He concluded that the prophesies that schools would be closed if the bill should pass were groundless.[261] He declared:

> As to the threat in regard to the school clause that we will destroy the schools of some of the States, I have only to say that it is rather late in the day to be making threats of any kind, and we are all tired of these continual threats of what will be done if we do not quit legislating to protect our citizens in their rights. But there is no danger whatever that these threats will ever be carried into effect, or if they are, if the Legislature of Virginia or of Tennessee should fail to appropriate for one year, they would find their people were wiser than they were, and it would not be repeated. But should the worst come, should the schools fall, let them fall, but let justice be done.[262]

IV. The High-Water Mark

In the elections of 1874 the Republican Party suffered a political hemorrhage. The hold-overs in the Senate kept it Republican by a much reduced margin. The policy of the equalitarians, who had passed the fourteenth amendment, to admit sparsely populated western states with more trees than people as soon as two staunch Republicans could be found to give them equal Senate representation paid handsome party dividends. But in the House, where more nearly "one-man, one vote" obtained, a party line-up of 194 Republicans, 92 Democrats, and

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[259] *Id.* at 4782.

[260] *Id.* at 4782-83, 4785.

[261] 2 Cong. Rec. app. 478-79 (1874).

[262] *Id.* at 479.

14 others, in the 43d Congress, became 109 Republicans, 169 Democrats, and 14 others, in the 44th Congress.[263] Massachusetts, that bastion of Republicanism, was swept by the Democratic tidal wave; even Butler's own seat could not be saved from the holocaust.[264] The depression, fraud, corruption, and sundry scandals were major Democratic assets, but the "party of the rebellion" also made the civil rights bill, and especially race-mixing in schools, pay handsome dividends in the election.[265]

When the "lame-duck" second session of the 43d Congress met in the early part of 1875, Congressman Alexander White, an Alabama Republican lawyer, moved to amend the Senate bill by specifically permitting school segregation, while Congressman John Cessna, a Pennsylvania Republican lawyer, moved to retain the Senate bill intact, and Congressman Stephen W. Kellogg, a Connecticut Republican lawyer, moved to strike all reference to schools.[266] Congressman John R. Lynch, a Mississippi Republican Negro photographer, then launched into a defense of the Senate school clause. He said:

> I regard this school clause as the most harmless provision in the bill. If it were true that the passage of this bill with the school clause in it would tolerate the existence of none but a system of mixed free schools, then I would question very seriously the propriety of retaining such a clause; but such is not the case. . . . [I]t simply confers upon all citizens [the right] . . . to send their children to any public free school that is supported in whole or in part by taxation, the exercise of the right to remain a matter of option as it now is—nothing compulsory about it. That the passage of this bill can result in breaking up the public school system in any State is absurd. The men who make these reckless assertions are very well aware of the fact, or else they are guilty of unpardonable ignorance, that every right and privilege that is enumerated in this bill has already been conferred upon all citizens alike in at least one-half of the States of this Union by State legislation. In every Southern State where the Republican Party is in power a civil rights bill is in force that is more severe in its penalties than are the penalties in this bill. We find mixed-school clauses in some of their State constitutions. If, then, the passage of this bill, which does not confer upon the colored people of such States any rights that they do not possess already, will result in breaking up the public-school system in their respective States, why is it that State legislation has not broken them up? This

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263U.S. BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957, 691 (1960).

264TREFOUSSE, BEN BUTLER 230 (1957).

2653 CONG. REC. 951, 952, 978, 982, 1001, app. 17, 20, 113 (1875).

2663 CONG. REC. 938-39 (1875).

> proves very conclusively, I think, that there is nothing in the argument whatever. . . . My opinion is that the passage of this bill just as it passed the Senate will bring about mixed schools practically only in localities where one or the other of the two races is small in numbers, and that in localities where both races are large in numbers separate schools and separate institutions of learning will continue to exist, for a number of years at least.[267]

Lynch then read an editorial from the Jackson *Clarion*, a Democratic newspaper, that the pending bill would have no effect on the Mississippi school system. He concluded that although Negroes did not want mixed schools, they did not want to be separated by law instead of individual choice, and declared that if the bill were passed, "there will be nothing more for the colored people to ask or expect in the way of civil rights."[268]

Congressman William E. Finck, an Ohio Democratic lawyer who had voted against the fourteenth amendment in the 39th Congress, stated that it did not give the federal government power to regulate admission to schools. He quoted copiously from the *McCann* case to support this proposition.[269] Congressman John B. Storm, a Pennsylvania Democratic lawyer, also urged that segregated schools conferred equal rights.[270] Cain, a South Carolina Negro Republican, added that he thought

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[267] *Id.* at 945.

[268] *Ibid.* He said:

> [I]t is contrary to our system of government to discriminate by law between persons on account of their race, their color, their religion, or the place of their birth. It is just as wrong and just as contrary to republicanism to provide by law for the education of children who may be identified with a certain race in separate schools to themselves, as to provide by law for the education of children who may be identified with a certain religious denomination in separate schools to themselves. The duty of the law-maker is to know no race, no color, no religion, no nationality, except to prevent distinctions in any of these grounds, so far as the law is concerned.
>
> The colored people in asking the passage of this bill just as it passed the Senate do not thereby admit that their children can be better educated in white than in colored schools; nor that white teachers because they are white are better qualified to teach than colored ones. But they recognize the fact that the distinction when made and tolerated by law is an unjust and odious proscription; that you make their color a ground of objection, and consequently a crime. This is what we most earnestly protest against. Let us confer upon all citizens, then, the rights to which they are entitled under the Constitution; and then if they choose to have their children educated in separate schools, as they do in my own State, then both races will be satisfied, because they will know that the separation is their own voluntary act and not legislative compulsion.

[269] *Id.* at 948.

[270] *Id.* at 951.

Negroes "shall not lose anything if it [the school clause] is struck out." He said that they "could afford for the sake of peace in the Republican ranks, if for nothing else—not as a matter of principle—to except the school clause."[271] A Virginia Democrat praised the state's school system and warned that the bill would deliver a fatal blow to it,[272] a view which a Republican colleague of his endorsed.[273]

The next day, February 4, 1875, was the last day of House debate. Congressman James B. Sener, a Virginia Republican lawyer who had been defeated for re-election, told the House that not only would the school clause demolish the southern school systems, but also it would drag down the Republican Party in the South.[274] Congressman Ellis H. Roberts, a Republican newspaper editor from New York, opposed the complete elimination of the school clause because he wanted to give Negroes the right to go to school, but favored the segregation provision so that the South would not be antagonized.[275] A Missouri Republican, who also had been defeated, extolled the segregated schools of St. Louis and opposed the bill.[276]

Cain arose, despairing of the school clause, which he called the most important part of the bill. He said:

> As a republican, and for the sake of the welfare of the republican party, I am willing, if we cannot rally our friends to those higher conceptions entertained by Mr. Sumner—if we cannot bring up the republican party to that high standard with regard to the rights of man as seen by those who laid the foundation of this Government—then I am willing to agree to a compromise. If the school clause is objectionable to our friends, and they think they cannot sustain it, then let it be struck out entirely. We want no invidious discrimination in the laws of this country. Either give us that provision in its entirety or else leave it out altogether, and thus settle the question.[277]

Under questioning, Cain averred that the southern Negroes did not want mixed schools, and said that the only mixed institution in South Carolina was the state college. He further declared that if Congress would force people to accept mixed schools, they would obey without trouble. But he once again concluded that he would prefer the school

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[271] *Id.* at 957.

[272] 3 CONG. REC. app. 119-20 (1875) (remarks of Congressman Eppa Hunton).

[273] *Id.* at 158-59 (remarks of Congressman Ambler Smith).

[274] 3 CONG. REC. 978-79 (1875). He said: "in this effort they are crippling the great republican party in eight of the [southern] states . . . which . . . cast their electoral vote for . . . Grant. . . ."

[275] *Id.* at 980-81.

[276] *Id.* at 981 (remarks of Congressman Edwin O. Stanard).

[277] *Ibid.*

clause striken rather than have a segregation provision therein.[278]

Congressman Simeon B. Chittenden, a New York Republican, then explained why he was going to vote against the bill:

> I do not want to go down with my party quite so deep as the bill would sink it if it becomes the law, and that is the reason why I speak. . . . I am a practical man, and believe it impolitic unnecessarily to vex white men, North and South, by passing this bill now.[279]

White of Alabama then made a major speech in favor of the segregation amendment. He attacked fellow Republican extremists and counseled "moderation on this subject." He said that the evil "to be remedied by this bill is that the people of color in many of the States are denied the privilege of admission to public schools." He added that neither Negroes or whites in the South desired race-mixing and adverted to the action of the House Judiciary Committee in reporting a school segregation amendment, commenting as follows:

> This is a question of expediency, not a matter of right. Your committee concede this by providing in their bill for separate schools. Had it been a matter of right or of principle, they could not have provided in their bill for separate schools; but as it was neither, but only a question of expediency, they could do so, and acted wisely and well in so doing.[280]

White then made a lengthy political analysis, in which he pointed out that the civil rights bill was changing so many white votes that it would cost the Republican Party every southern state.[281] Speaking of the Republican mountain areas, he warned:

> No earthly power could have loosed your hold upon them but the republican party itself. But when you proposed to put the Senate bill upon them; when, as they were told, you proposed to invade the sanctity of their homes and to force social equality

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[278] *Id.* at 981-82.

[279] *Id.* at 982.

[280] 3 CONG. REC. app. 15 (1875).

[281] *Id.* at 16-24. He said:

But it is to the effects of this measure upon the people of the Southern States I wish to call attention. The elections there have swept nearly every republican Representative from the States of Virginia, West Virginia, North Carolina, Tennessee, Georgia, Alabama, and Arkansas . . . while in the State Legislatures there has been a corresponding diminution of power. Falling bodies move with accelerated rapidity and cumulative force, and unless this downward movement is speedily checked, in a brief time the republicans in the South will have no Representative here, and no power or influence in

> upon them; when you proposed to force their children into schools with colored children or deprive them of the benefits of the common schools, the blood of the Anglo-Saxon rebelled, and they turned away from you. You may say that this is a prejudice but they say it is not, that it is a sentiment; but whether the one or the other it is a fact, and a stubborn fact—one that will not yield to force. If the civil-rights bill which is on your table becomes the law, you will drive these men, whose fidelity to republican principles has been proven by sacrifices and trials to which no northern republican has been subjected, permanently away from you, and you obliterate in a brief time the republican party South.[282]

Kellogg then explained that he was moving to strike out the school clause because schools should be under local control, because the school clause might injure the school systems, and because national legislation should not provide for segregation by law. Congressman James Monroe, an Ohio Republican, added that although he preferred the Senate bill, he would rather have the school clause striken out than to take the House Judiciary Committee's provision providing for segregated schools. He explained that Negroes and radicals were opposed to any statutory racial distinctions, and would prefer to take their chances for obtaining an education for colored students under the Constitution without a statute, than to accept segregated education under federal law.[283] Congressman Barbour Lewis, a Tennessee Republican, warned about sentiment against school-mixing in the South.[284]

Congressman Julius C. Burrows, a Michigan Radical Republican, arose to warmly endorse the Senate bill. He pointed to the widespread illiteracy among Negroes as the reason why they needed schools more than anything else. He further protested against the school segregation provision as "entering upon that course of legislation which draws a line of demarcation between [A]merican citizens who by your laws and your Constitution stand in absolute equality. . . ."[285] He added that the

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> a Legislative Assembly in the South. . . . These consequences have followed from the proposal to pass the civil rights bill of last session, and will be multiplied and it may be made irreparable by its passage. The result then will be to lose you the entire South, and to break and dissipate your political power there for all time to come. Looking at it as a mere question of party tactics, where in the North and West can you expect to gain, by the passage of this bill, States or voters to compensate you for the loss of nine hundred thousands voters and seven or eight States in the South?

Id. at 17.

[282] *Id.* at 20.

[283] 3 CONG. REC. 997-98 (1875).

[284] *Id.* at 998-99.

[285] *Id.* at 999.

provision permitting states to establish school segregation "is to establish by Federal law separate schools in the majority of the States of this Union." To this, objection came on several grounds. First, he said that it would create racial prejudice in small children where none had existed before. Second, he urged that a segregated school system would double the expense for schools. Finally, he said that the federal law would reopen the contest about school segregation in those states which had already eliminated it by local law. He named Connecticut, Illinois, Iowa, Massachusetts, Minnesota, and Michigan as states where school segregation had been abolished.[286] Rapier, the Negro Republican colleague of White, also rejected any compromise and made an emotional appeal for the Senate bill.[287]

Congressman William W. Phelps, a New Jersey Republican lawyer, opposed the bill as unconstitutional and destructive of the budding southern school systems. But his main argument was political. He said that the two parties had divided in the last election on the bill, and that the people voted against it emphatically.[288] But Congressman Charles G. Williams, a Wisconsin Republican, opposed school segregation, "thereby nurturing a prejudice they never knew, and preparing these classes for mutual hatred hereafter, though they are the ones . . . upon whose action the peace and tranquility of the nation must depend."[289] Finally, two Republicans appealed for Democratic votes to let Negroes go to school, based on God and the 1872 Democratic platform.[290] Butler of Massachusetts, who concluded the debate, also expressed a preference for no school provision rather than for one with segregated schools.[291]

A vote was then taken on Kellogg's motion, striking out the entire school clause, including its section permitting states to maintain segregated schools. This vote carried by 128 to 48. A vote to restore the school clause, and providing for segregation in schools and other public accommodation, on White's motion, lost by 114 to 91. In neither case were the yeas and nays taken.[292]

Federal compulsion of school desegregation then reached what would be its high water mark for over three-quarters of a century. A vote was taken on restoring the school clause as it passed the Senate.

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[286] *Id.* at 1000.

[287] *Id.* at 1001.

[288] *Id.* at 1001-02.

[289] *Id.* at 1002.

[290] *Id.* at 1003 (remarks of Congressman William A. Phillips and Congressman John P. Shanks).

[291] *Id.* at 1005.

[292] *Id.* at 1010.

This vote lost by 114 yeas to 148 nays.[293] The affirmative votes were all cast by Republicans. Of the negative votes, 61 were cast by Republicans and 87 by Democrats. All the few remaining Democrats who had served in the 39th Congress, Charles Eldredge of Wisconsin, William E. Finck of Ohio, William E. Niblack of Indiana, and Samuel J. Randall of Pennsylvania, all of whom had voted against the fourteenth amendment in the House, and James W. Nesmith of Oregon, who as Senator was absent when the vote was taken on it in 1866, voted nay, as could be expected.

The Republican vote is of more interest. The school clause split off about one-third of the Republican party. This split was not based on North-South lines. Of the Republicans voting for the school clause, 98 came from the North, 1 came from a border state (Maryland), and 15 came from the South. Of the Republicans voting against the school clause, 37 came from the North, 7 from the border states of Delaware, Maryland, West Virginia, and Missouri, and 17 came from the South. To further show the nature of the split, all five Republicans from Louisiana, all three from Mississippi, and all four from South Carolina voted for the school clause, while four out of five from Alabama, all five from Tennessee, and four out of five from Virginia voted against it. Seven out of nine Michigan Republicans voted for it, but all three Minnesota Republicans voted against it. The New Jersey Republican delegation was split three to three, while the Pennsylvania delegation was split, twelve for and nine against. There was a somewhat heavier vote against the clause by Republicans in marginal seats. About one-third of the Republicans who voted for the school clause had been defeated in 1874, while one-half who had voted against it had been defeated. However, this does not seem to be such undue proportion as to lead to the conclusion that the defeats in 1874 were the sole factors for voting against the clause, although doubtless they were an important cause.

By this time only a handful of Republicans sat in the House who had been in the 39th Congress and voted for the fourteenth amendment. The following of that group voted for the school clause: Godlove S. Orth of Indiana, John A. Kasson of Kansas, Henry L. Dawes and Samuel Hooper of Massachusetts, James A. Garfield and William Lawrence of Ohio, William D. Kelley, Leonard Myers, and Charles O'Neill of Pennsylvania, and Philetus Sawyer of Wisconsin, all of whom but Hooper and Sawyer were lawyers. Four Republicans who had voted for the fourteenth amendment voted against the school clause. They were Hezekiah S. Bundy, an Ohio Republican lawyer, Robert S. Hale, a former New York State judge whose speech against the original draft of the four-

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[293] *Id.* at 1011.

teenth amendment had resulted in the substantial rewording of the first section,[294] Glenni W. Scofield of Pennsylvania, a former state judge, who had several years before spoken against railroad segregation,[295] and Luke P. Poland, a former Chief Justice of the Vermont Supreme Court who had likewise taken a prominent part in urging passage of the fourteenth amendment, as a senator from that state.[296]

The House vote for the fourteenth amendment was 128 to 37.[297] The party line-up in the 39th Congress of 149 Republicans and 42 Democrats[298] is not very dissimilar to the total vote on the school clause of 142 Republicans and 58 Democrats, if the southern and Nebraska delegations, which were unrepresented in the 39th Congress when the fourteenth amendment was proposed, is eliminated from both party totals. Thus, if the third of the Republicans in the House which had defected on the school clause at the end of the reconstruction in 1875, were presented with a school clause by the Radicals in 1866, and likewise defected then, as they probably would have, it would have meant a swing of 40 Republican votes. The vote on the fourteenth amendment with a school desegregation provision would have been about 88 to 77, far less than the two-thirds necessary for passage. A school desegregation provision on the fourteenth amendment would have blocked that amendment in the House, without considering the more narrowly divided Senate.

V. Summary and Conclusions.

In contrast to the scanty debates in 1866 on schools, those on the Civil Rights Act of 1875 were voluminous and exhaustive. These debates have been set forth at some length above to demonstrate that virtually every possible position that is espoused today was known and advocated by 1875 in regard to race relations and schools. Moreover, every substantial argument for or against school segregation or integration was known and advocated at that time. The only difference today is that partisans of these positions are using longer words and bigger footnotes to say the same thing. One must flatter oneself to believe that

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[294] See Cong. Globe, 39th Cong. 1st Sess. 1063-66 (1866).

[295] Cong. Globe, 40th Cong., 2d Sess. 1965 (1868).

[296] Cong. Globe, 39th Cong., 1st Sess. 2961-64 (1866). Poland was also a member of the House Judiciary Committee which drafted the committee's school segregation provision, and was one of the three Republican committee members to vote against the Senate school clause, four of them voting for it.

[297] *Id.* at 2545.

[298] U.S. Bureau of the Census, Historical Statistics of the United States, Colonial Times to 1957, 691 (1960).

one has something really new to say on the subject which was not said almost a century ago.[299]

The views expressed ranged the entire spectrum. The unreconstructed Democrats from Delaware and Kentucky expressed the *antebellum* view that Negroes paid so little in taxes that they ought to be exempted from taxes for schools and should not go to any kind of school at all. We need not concern ourselves with what they thought of the fourteenth amendment. More progressive Democrats such as Thurman and Merrimon thought that the fourteenth amendment had nothing to do with schools, or at least school segregation, and that Negroes in schools should be rigidly segregated by law. However, as all Democrats and conservatives voted against the fourteenth amendment, their views are not too significant.

The "swing" group of Republican moderates, who made possible the fourteenth amendment, led by Trumbull of Illinois, believed that the right to go to school was not a civil right protected by the fourteenth amendment, over which Congress could legislate. As for the District of Columbia, this group advocated or acquiesced in separate and equal facilities by law for Negroes. This group included not only the moderates of 1866, but also such erstwhile regulars and Radicals as Morrill of Maine, Poland of Vermont, and Sprague of Rhode Island. It constituted at all relevant times about a third of the Republican strength in both Houses of Congress.

There was also a handful of regulars, such as Pratt of Indiana and Sherman of Ohio, who believed that the *McCann* case was correctly decided but that Congress could abolish at least state-wide school segregation laws. Apparently, they believed that the local school boards should decide whether schools should be segregated or integrated. Their view would probably also require the overruling of *Berea College v. Kentucky*.[300]

The Radical view, as illustrated by the speeches of Edmunds of Vermont, Frelinghuysen of New Jersey, and Howe of Wisconsin, was that the fourteenth amendment prohibited state or local laws which segregated students by race, but that school boards could maintain a dual

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[299]See 3 CONG. REC. 950 (1875), where Congressman John B. Storm, a Pennsylvania Democrat stated:

> I believed that this subject had been talked threadbare both before the House and the country. Since 1870 it has been discussed in all its various phases, so that it is impossible for the ingenuity of man to say anything either new or original upon it.

Congressman Eppa Hunton a Virginia Democrat also said: "So much has been said on the civil rights bill that but little can be uttered now either new or interesting." 3 CONG. REC. app. 117 (1875).

[300]Berea College v. Kentucky, 211 U.S. 45 (1908).

system of schools and do everything to encourage racial segregation short of compelling it. This view would sustain *Brown v. Board of Educ.*,[301] if read very narrowly, far more narrowly than the Supreme Court has ever read it. It would certainly not support the gloss placed on it by *Goss v. Board of Educ.*,[302] or by the later decisions of the lower federal courts.[303]

Finally, the Sumner-Boutwell view was that there should be a single school system with everybody going to his neighborhood school. This is the way the Supreme Court has so far viewed the fourteenth amendment. Nobody suggested that the school authorities had an obligation to transport students around the city to eliminate "de facto" segregation because of neighborhood population patterns.

A determination of which of these views the fourteenth amendment embodied is a matter of simple arithmetic. Boutwell's proposal received not a single additional vote from a northern Republican, so obviously the fourteenth amendment could not have embodied this. The Radical ideas, as embodied in the Senate bill, never obtained a two-thirds vote in either House, which would have been necessary to embody it in a constitutional amendment. The Republicans who voted against the school clause did not do so, as has been suggested, because of the stock warnings that southerners would dismantle their school systems.[304] This was simply a makeweight argument that those against the school clause used, with those for it either claiming that it would not occur or willing to take their chances. Those Republicans who opposed the school clause either did so because of fear of voter reaction, personal belief that the fourteenth amendment did not require school desegregation, or personal hostility to school desegregation, or a combination of these views. Insofar as such action was based on fear of voter antipathy, it constitutes a strong argument against the possibility that the fourteenth amendment requires school desegregation. The amendment was proposed as a platform for the Republican Party to run on in the key fall 1866 elections,[305] and the party was forced to forego its far more moderate and ardently desired objective of Negro suffrage for this reason. Indeed,

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[301]347 U.S. 483 (1954).

[302]Goss v. Board of Educ., 373 U.S. 683 (1963).

[303]A number of these are collected in Dowell v. School Bd., 244 F. Supp. 971 (W.D. Okla. 1965).

[304]Frank & Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 COLUM. L. REV. 131, 161-62 (1950). Professor Kelley has indicated that threats of school closing were important, but even he has recognized that political considerations were decisive. Kelly, *The Congressional Controversy Over School Segregation* 1867-1875, 64 AMER. HIST. REV. 537, 554-61 (1959).

[305]JAMES, THE FRAMING OF THE FOURTEENTH AMENDMENT 110-20, 123-24, 134-35, 145 (1956).

Sherman had warned his colleagues to be "moderate" and "to waive extreme opinions,"[306] and Democrats twitted the majority on its surrender to the voters.[307] In light of the fact that the House at the beginning of the reconstruction period had given District of Columbia Negroes the ballot,[308] even before the fourteenth amendment was proposed, but never, even by 1875, had desegregated District schools, it is inconceivable that the fourteenth amendment would have been loaded down with a proposition so likely to defeat both it and the Republican Party.[309]

In 1866, as in 1875, the Republicans could not have afforded to lose a third, or indeed, any significant number of their party ,and still muster a two-thirds vote in the Congress. The moderates held the balance of power in 1866. Their views must therefore be deemed decisive, since without them nothing could have been accomplished. This group emphatically and consistently demonstrated that it considered that the fourteenth amendment neither compelled of itself nor gave Congress the power to compel school desegregation.

The conclusion is inevitable. The rule of *Brown v. Board of Educ.* is not now, nor has it ever been, the supreme law of the land. Rather, it is an unwarranted exercise of non-existent authority which, being illegitimate in its origin, cannot be made legitimate by the lapse of time, nor by compliance, voluntary, purchased, or coerced. As for so-called "de facto" segregation, to believe that the fourteenth amendment mandated elimination of this requires a complete hallucination. The short answer to the array who urge the contrary was given by Mr. Justice Field, a contemporary of the amendment, in another context as follows:

> But notwithstanding the great names which may be cited in favor of the doctrine, and notwithstanding the frequency with which the doctrine has been reiterated, there stands, as a perpetual protest against its repetition, the constitution of the United States, which recognizes and preserves the autonomy and independence of the states. . . . Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the

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[306]CONG. GLOBE, 39th Cong., 1st Sess. app. 132 (1866).

[307]CONG. GLOBE, 39th Cong., 1st Sess. 2530 (1866) (remarks of Congressman Randall).

[308]*Id.* at 311.

[309]See 3 CONG. REC. 1001 (1875), where Congressman William W. Philps, a Republican opponent of the civil rights bill from New Jersey, declared that in the form of the bill Sumner left "the [Republican] party which he created and led, a legacy so full of the seeds of disintegration and decay. . . ."

> authority of the state, and, to that extent, a denial of its independence.[310]

If a synthesis of radical and moderate views on schools were attempted, it would result in a doctrine that it is the parent and not the State who must control the educational atmosphere of the child. In such a synthesis, the duty of each school board is to create, consistently with efficient school administration, such a number of schools, both segregated and integrated, by race or otherwise, as will afford to the parents an opportunity to place their children in the educational atmosphere which they desire. Such a scheme would give the fullest opportunity for freedom of choice and association, but yet guard any child against unwanted association. To the extent that it is administratively feasible, the local school board should run a variety of schools and classes to suit the desires of all segments of the community. To the extent that the fourteenth amendment has anything to do with school segregation, it merely guarantees individual freedom of choice, consistent with the choice of all other individuals. Anyone who thinks he has a right to force himself on others is not asserting his fourteenth amendment rights but trampling on the rights of others.

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[310]Baltimore & Ohio R.R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (dissenting opinion) quoted in Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938).

SCHOOL SEGREGATION AND PROFESSOR AVINS' HISTORY: A DEFENSE OF BROWN v. BOARD OF EDUCATION

*Walter E. Dellinger, III**

For Professor Avins the conclusion is inevitable: "The rule of *Brown v. Board of Educ.* is not now, nor has it ever been, the supreme law of the land."[1] He is not the first to express this view and, unfortunately, he will not be the last.[2] His article commands attention, however, because it is the product of historical research by a scholar with impressive credentials. His evidence and his reasoning are nonetheless unconvincing: they simply do not lead to the conclusion that the school segregation cases were wrongly decided.

Professor Avins' article is an attempt to reduce the broad guarantees of the fourteenth amendment to a series of fixed, mechanical rules.[3] He finds it unnecessary even to consider the basic judgment of the *Brown* decision that a state denies Negro children equal treatment by compelling them to attend segregated schools. For in his view the command of the fourteenth amendment that "No state shall . . . deny to any person . . . the equal protection of the laws" does not apply to school segregation even if such segregation in fact constitutes unequal treatment. His reason: despite its seemingly broad language, the amendment, as originally understood by the Congress that sent the amendment to the states, was not intended to apply to school segregation. Therefore, a judicial decision in 1954, purporting to rest upon the fourteenth amendment and

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[1]Because of the publication schedule, it will not be possible for the author to cite by page or footnote to Professor Avins' article which immediately preceeds this reply. Uncited quotations are to that article.

[2]I do not mean to imply that all criticism of the Court's decision is irresponsible. Legal scholarship is quite fortunate, for example, to have such a provocative, critical assessment of the Court's opinion as Professor Wechsler's *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31-34 (1959).

But there is a difference, to my ear at least, between the statement that a case was incorrectly decided and Avins' assertion that *Brown* is "not the supreme law of the land." One might believe, of course, that an incorrect decision by the Supreme Court is not "law" in some theoretical sense. In the context in which it is offered, however, Avins' statement will lead some to think that he believes that a citizen has no obligation to comply with the holding. While I do not read him as urging citizens or officials to disobey the law, I think that his choice of language is, at best, unfortunate. See *Cooper v. Aaron*, 358 U.S. 1 (1958).

[3]A further exposition of Professor Avins' views on the interpretation of the

holding segregated public school systems unconstitutional, is an "unwarranted exercise of non-existent authority . . . ."

The first problem with Avins' thesis is that the evidence he presents concerning the "intention" of Congress is implausible. He states first that the 1866 Congressional debates on the fourteenth amendment offer only scanty and inconclusive evidence of the amendment's intended impact on segregation in public schools. He claims, however, that abundant "reflected" evidence of Congress' intention can be found in proceedings that occurred *eight years after the fourteenth amendment was promulgated,* when a later Congress considered, as a part of the Civil Rights Act of 1875, a proposed clause providing for desegregated public schools. How do the actions of the 43d Congress reflect upon the intention of the 39th Congress that passed the fourteenth amendment? Avins argues as follows. Congress failed to enact the school desegregation clause in 1874 because the Moderate Republicans in Congress declined, for various reasons, to support such a provision. He therefore assumes that had the fourteenth amendment, when it was considered in 1866, contained a specific school desegregation clause, Moderate Republicans would not have supported the amendment. Without the support of the Moderates the fourteenth amendment would not have received the two-thirds vote necessary for passage. Thus, (in Avins' words) "as a matter of simple arithmetic" the amendment does not apply to school segregation.

For several reasons, this 1874 "evidence" is virtually worthless as an indicator of the intention of the Congress that promulgated the fourteenth amendment in 1866. In the first place the membership of Congress and of the Moderate block changed substantially between 1866 and 1874.[4] To the extent that different people are involved, it is highly questionable to assume that the views of the "Moderates" of 1874 can be read back as being the views of the "Moderates" of 1866.

Even more troublesome is the problem of ascertaining the meaning of the Moderates' opposition to the 1874 school clause. At one point Avins asserts that by their 1874 statements and votes against the proposed school clause the Republican Moderates demonstrated their constitutional judgment that "the fourteenth amendment neither compelled of itself

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fourteenth amendment may be found in recent articles dealing with other aspects of racial discrimination. See Avins, *The Civil Rights Act of 1875: Some Reflected Light on the Fourteenth Amendment and Public Accommodations,* 66 COLUM. L. REV. 873 (1966); Avins, *Anti-Miscegenation and the Fourteenth Amendment: The Original Intent,* 52 VA. L. REV. 1224 (1966).

[4]In the instant article Avins states that in 1874 "only a handful of Republicans sat in the House who had been in the 39th Congress and voted for the fourteenth amendment." In his related article in the *Columbia Law Review* Avins states that sixteen of the thirty-three Senators who voted for the fourteenth amendment participated in the debates on the Civil Rights Act of 1875. Avins, *supra* note 3, at 875.

nor gave Congress the power to compel school desegregation." Neither the debates recounted nor the votes recorded are adequate to support Avins' claim.

Granted, the proposed school clause of 1874 attracted insufficient support to be enacted. One should hesitate, however, before relying upon that naked fact. To give affirmative content to the failure of Congress to pass proposed legislation is often misleading. A legislature does not enact a principle by failing to enact its opposite. In this particular instance, the fact that a given congressman voted against the desegregation clause does not necessarily mean that he approved (even in 1874) of segregated schools or that he thought such segregation constitutional. More than one congressman, for example, is quoted as having decried the harsh penalties incorporated into the school clause of the 1874 bill. One might very well believe that segregated schools violate the fourteenth amendment and yet shrink from a bill that would enforce desegregation (as this one would have) by subjecting school board members, principals, and teachers to the criminal sanctions of fine and imprisonment.[5]

Nor do the debates on the school clause justify the assumption that the Moderates cast their negative votes for constitutional reasons. Admittedly, some Moderates who had voted for the fourteenth amendment expressed the retrospective view that the amendment "neither compelled of itself nor gave Congress the power to compel school desegregation." Avins' article itself, however, is replete with other reasons for the votes against the clause. Frequently, the statement was made that passage of the clause would result in the destruction of the public school system in the South. (This argument was made so often that it is referred to as the "stock argument about school closing.") Avins, in fact, states that those Republicans who opposed the school clause did so either because of "personal belief that the fourteenth amendment did not require school desegregation" *or* because of fear of voter reaction, personal hostility to desegregation, or a combination of these views.

His own admission seriously undercuts his thesis. Had he shown most of the Republican Moderates stating unequivocally that they were voting against the school clause because they believed school segregation outside the proscriptions of the fourteenth amendment, and that this had been their understanding eight years earlier when they had supplied the votes necessary for the passage of that amendment, his point would

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[5]See CONG. GLOBE, 42 Cong., 2d Sess. app. 142 (1872).

[6]Even if the 1874 evidence had established unmistakably the constitutional point he sought to draw from it, such evidence still would not have foreclosed the *Brown* decision. The drastic changes that have occurred in the role of public education over the last century negate any attempt to find an explicit intention regarding the

have been stronger.[6] As it stands, the record indicates that many of the votes cast against the clause were motivated by reasons completely unrelated to the arguments over the constitutionality of segregated schools. It is perfectly possible that a congressman could have voted for the fourteenth amendment with the understanding that the amendment was capable of supporting congressional or judicial action against segregation and then found eight years later that it was politically unfeasible for him to vote for a bill enforcing immediate desegregation of the public schools.

Apart from the inadequacy of his evidence, Avins' thesis is subject to a more fundamental objection. He fails to examine the possibility that the fourteenth amendment was intended to have both immediate and long-range consequences. In his landmark study, *The Original Understanding and The Segregation Decision,*[7] Alexander Bickel concludes that the amendment was intended to carry out immediately only the limited objectives that had been embodied in the Civil Rights Act of 1866. That bill covered basic areas such as the right to sue and to

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segregated schools of our time. The point has been made most sharply by Charles L. Black, Jr.:

> The question of the "intent" of the men of 1866 on segregation *as we know it* calls for a far chancier guess than is commonly supposed, for they were unacquainted with the institution as it functions in the American South today. To guess their verdict upon the institution as it functions in the midtwentieth century supposes an imaginary hypothesis which grows more preposterous as it is sought to be made more vivid.

Black, *The Lawfulness of the Segregation Decisions,* 69 YALE L.J. 421, 424 (1960).

The use of legislative evidence—however persuasive—gleaned from debates that took place eight years after the passage of a constitutional amendment also raises serious theoretical problems. In his provocative discussion, *The Blinding Light: The Uses of History in Constitutional Interpretation,* 31 U. CHI. L. REV. 502 (1964), John Wofford argues that the law-giver whose intention should be consulted with regard to the meaning of a constitutional provision is not only Congress, but the state conventions or legislatures that must ratify the amendment. After including the states in the calculus of intention, the search becomes virtually impossible. One answer to Wofford is that whatever the congressional debates establish should constitute a rebuttable presumption, since "it is not unrealistic, in the main, to assume notice of congressional purpose in the state legislatures." Bickel, *The Original Understanding and the Segregation Decison,* 69 HARV L. REV. 1, 7 (1955). This answer, however, does not apply to legislative history supplied in Congress *after* an amendment has been ratified by the states. The states could not, in the nature of things, have had any notice of the "intention" that Avins purports to uncover from the records of 1874.

In addition to the problems of theory mentioned above, other obvious considerations should restrain a doctrine that would allow constitutional provisions, or statutes, to be restricted or "repealed" by post-enactment declarations of a few men whose votes had been essential to passage.

make contracts but was not directed at such problems as jury service, sufferage or school segregation. Bickel goes on to conclude, however, that Congress did not limit the amendment to these few immediate objectives but established a general standard of equality that could be applied in the future to other problems. The important fact is that the Joint Committee on Reconstruction rejected, as a draft for the fourteenth amendment, a specific and exclusive enumeration of the limited rights embodied in the 1866 Act. They chose instead to write a broad, organic provision. They chose language dealing not only with the immediate concern of racial discrimination, but with any discrimination that deprives "any person" of equal protection, whether or not based on race; they chose, instead of a provision limited to equal protection of life, liberty and property, one expanded to insure equal protection "of the laws." While finding no specific purpose going beyond the limited protections afforded under the 1866 Act, Bickel does find "an awareness on the part of the framers that it was *a constitution* they were writing, which led to a choice of language capable of growth."[8] Through this choice of language the amendment fulfilled a dual purpose: it provided for the immediate correction of a certain set of specific, pressing evils (a set which perhaps did not include segregation) *and* it established a general anti-discrimination standard capable of later concrete application to other problems. The question of affording greater liberty in constitutional form to the Negro than would have been encompassed in a specific enumeration of the limited guarantees of the 1866 Civil Rights Act was thus deferred, and the way left open for future Congresses (by legislation) and future courts (by the principled, evolutionary techniques of the judicial process) to draw from the equal protection clause a source of authority for measures insuring full equality.[9]

Avins' 1874 evidence in no way undermines the findings that Professor Bickel made ten years ago. All that Avins' article tells us is that Congress and the nation were not yet ready in 1874 to apply in full measure the equalitarian principle of 1866. The principle remained unimpaired, however, awaiting another day for its full vindication.[10]

In short, it is Professor Avins, and not the Supreme Court, who

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[7]69 HARV. L. REV. 1 (1955).

[8]*Id.* at 63.

[9]*Ibid.*

[10]This brief article is intended only as a reply to Professor Avins. I do not presume to answer all possible criticisms of the *Brown* decision. There is no doubt in my mind, however, that the case was correctly decided. The best affirmative argument for the decision is found in Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

seeks to rewrite the fourteenth amendment. In place of the broad guarantee of equal protection of the laws, Avins would substitute a detailed list of the rights included and excluded in the amendment. He would have the Court enforce only those rights to equality that would have been included had Congress chosen to promulgate such a detailed list. The short answer is that Congress did not so choose.

THE CRIMINAL VERSUS SOCIETY: SOME OBSERVATIONS ON THE ACCOMMODATION OF MISSISSIPPI CRIMINAL PROCEDURE TO THE EVOLVING CONCEPTS OF "CONSTITUTIONALIZED" DUE PROCESS

*Parham H. Williams, Jr.**

PART III: THE RIGHT-TO-COUNSEL PROBLEM

> See how yond justice rails upon yond simple thief. Hark, in thine ear: change places; and handy-dandy which is justice, which is the thief?
>
> ——*King Lear.* Act IV, Sc. 6.

A. The Historical Development

Will Shakespeare's trenchant inquiry struck at the root source of the inequity which pervaded the common law criminal process. For in that period of our developing legal system, a person accused of committing a felony was not allowed to have a lawyer represent him during the trial.[233] And without a lawyer, the accused, usually ignorant and uneducated, almost always untutored in the law, was helpless to defend himself before the skillful onslaught of the Crown prosecutor.

To prevent such injustice in their new nation, the founding fathers demanded the inclusion in the Constitution of an amendment which would guarantee the right of an accused felon to be heard by counsel during his trial.[234] This amendment provided simply: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."[235] Although this guaranty was operable only in the courts of the United States,[236] the individual states included in their constitutions provisions similar to that of the sixth amendment.[237] The guaranty embodied in the Mississippi Constitution is typical:

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*The first two parts of this article may be found at 37 MISS. L.J. 353 (1966) and 38 MISS. L.J. 57 (1966).

*Professor of Law, University of Mississippi.

[233]See Powell v. Alabama, 287 U.S. 45, 60 (1932).

[234]See Johnson v. Zerbst, 304 U.S. 458, 462 (1938).

[235]U.S. CONST. amend. VI.

[236]Spies v. Illinois, 123 U.S. 131, 166 (1887); West v. Louisiana, 194 U.S. 258 (1904); Betts v. Brady, 316 U.S. 455, 461 (1942).

[237]See Betts v. Brady, 316 U.S. 455, 467 (1942).

> In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation . . . .[238]

However, the right conferred by the sixth amendment and by the relevant provisions of the state constitutions was understood to mean only that an accused had the privilege of *employing* a lawyer to represent him during the proceedings. The constitutional provisions to the effect that a defendant should have the "assistance" of counsel or should have a right "to be heard by himself or counsel" were intended to do away with the common law rules which denied representation by counsel in criminal prosecutions, and were not designed to require the United States or individual states to provide counsel to an indigent charged with a noncapital felony.[239] The Congress early recognized, however, that even a poor man ought not be placed in jeopardy of losing his life without the assistance of a trained lawyer. One of the first legislative acts of the initial Congress, therefore, was to provide for the appointment of counsel in capital cases.[240] Similar provisions, either by statute or court decision, were subsequently embodied in the laws of the various states.[241]

Thus, during the first century and a half of our existence as a nation, the constitutional "right-to-counsel" was generally understood to mean: (a) that any person accused of any crime in any court, state or federal, had a right to *employ* a lawyer to represent him during the preparation and trial of the case; and (b) that any indigent charged with a *capital* felony, in either state or federal court, was entitled to have a lawyer appointed by the court to represent him. Although by the end of this period a majority of the states made some provision for the appointment of counsel in noncapital felonies, the federal jurisdiction and a minority of states, including Mississippi, continued to adhere to the notion that their respective constitutions required the appointment of counsel only in capital cases.[242] Finally, in 1938, in *Johnson v. Zerbst*,[243] the United States Supreme Court interpreted the sixth amendment to mean that the government must appoint a lawyer to represent an indigent person charged with a noncapital felony in a federal court. In 1942, this right was extended, in *Evans v.*

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[238]MISS. CONST. art. 3, § 26.

[239]See Betts v. Brady, 316 U.S. 455, 466 (1942). *But see* Mr. Justice Black's dissent in the same case.

[240]1 Stat. 118 (1790).

[241]See Betts v. Brady, 316 U.S. 455, 467 (1942). See generally *id.* at 465-71.

[242]See the compilation of statutes and decisions in Mr. Justice Black's dissent in Betts v. Brady, 316 U.S. 455, 477-80 (1942).

[243]304 U.S. 458, 462-63 (1938).

Rives,[244] to include persons charged with misdemeanors in federal courts.[245]

The Court was much more reluctant, however, to extend the application of the sixth amendment guaranty to the state criminal process. Confronted with the question in *Betts v. Brady*,[246] a state case involving a noncapital felony, the Court was unwilling to concede an absolute right to appointed counsel in every state prosecution. Instead, it found the right to exist only in those cases in which "special circumstances," such as the ignorance, youth, or feeble-mindedness of the defendant, indicated that the absence of counsel would make the proceeding "fundamentally unfair."[247] This nebulous standard furnished no generally applicable guidelines and, as a consequence, the Court was confronted with numerous appeals during the next two decades which it could only resolve on an ad hoc basis.[248]

The issue was finally settled in 1963, when the Court in *Gideon v. Wainwright*[249] considered the appeal of a Florida convict who had been tried for a noncapital felony without the assistance of counsel. Overruling *Betts*, the Court found that the sixth amendment's guarantee of counsel is a right which is "fundamental and essential to a fair trial,"[250] and held that such right is made obligatory upon the states by the due process clause of the fourteenth amendment.

The plain meaning of the *Gideon* decision is that every indigent person charged with a felony in the state courts is entitled, if he so desires, to have an attorney appointed to represent him. The only

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[244]126 F.2d 633 (D.C. Cir. 1942).

[245]See FED. R. CRIM. P. 44 for the present procedure in the federal jurisdiction.

[246]316 U.S. 455 (1942).

[247]In *Betts* itself, the Court found that

> the accused . . . was a man forty-three years old, of ordinary intelligence, and ability to take care of his own interests on the trial. . . . He had once before been in a criminal court, pleaded guilty to larceny and served a sentence and was not wholly unfamiliar with criminal procedure.

Id. at 472. Since no "special circumstances" existed which would warrant the appointment of an attorney, the Court concluded that Betts had not been denied due process of law and affirmed his conviction.

[248]See, *e.g.*, Chewning v. Cunningham, 368 U.S. 443 (1962) (issues in case were so complex that "special circumstances" existed and trial without counsel violated fourteenth amendment due process); Uveges v. Pennsylvania, 335 U.S. 437 (1948) (defendant's youth constituted "special circumstances"); Wade v. Mayo, 334 U.S. 672 (1948) (defendant's unfamiliarity with court procedure constituted "special circumstances"); and Carnley v. Cochran, 369 U.S. 506 (1962) (defendant's illiteracy constituted "special circumstances").

[249]372 U.S. 335 (1963).

[250]*Id.* at 344.

valid objection to such a decision is that it came many years too late, for most would agree with Mr. Justice Sutherland when he said in *Powell v. Alabama*:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.[251]

B. The Scope of the Problem

The "problems" in constitutional criminal law are unique in that they stem not so much from what the law *is* as from what the law soon may be. The right-to-counsel problem is no exception. While *Gideon* settled one issue, it raised others which may ultimately prove far more unsettling and difficult of resolution. Among these new issues are: (1) When does the right-to-counsel begin? (2) Does the *Gideon* rule extend to misdemeanor prosecutions in state courts? (3) Does it encompass post-conviction proceedings, such as petitions for writs of habeas corpus and error coram nobis? (4) Does the rule extend to hearings on revocation of probation? (5) Is it applicable to proceedings in youth court? (6) Does it entitle the indigent defendant to assistance in addition to counsel, such as the services of an investigator or an expert witness?

It is arguable whether or not definitive answers can be given to any of the new issues raised by *Gideon*. Certainly, in the present fluid state of this area of the law, it would be presumptuous to assert pat answers and naive to propose solutions purporting to embody all possible constitutional requirements. Nevertheless, certain observations can be made which will prove helpful in bringing into focus the specific problem with which we are concerned, *i.e.*, how best to satisfy the *Gideon* requirements in Mississippi.

Fortunately, the Supreme Court has already furnished a partial answer to the first "new issue." In *Miranda v. Arizona*,[252] the Court held

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[251] 287 U.S. 45, 68-69 (1932).

[252] 86 Sup. Ct. 1602 (1966).

that the right-to-counsel begins at least as early as police questioning of an arrestee. "[A]n individual held for interrogation," said the Court, "must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation . . . ."[253] In addition, if the arrestee is unable to employ a lawyer, the police must clearly advise him that "one will be appointed for him prior to any questioning if he so desires."[254] *Miranda* thus extends the *Gideon* rule back to the interrogation process and confronts the state with the necessity of devising a workable means of providing counsel for the hundreds—perhaps thousands—of indigents arrested and interrogated each year in Mississippi.[255]

The second "new issue"—whether or not the *Gideon* decision applies to misdemeanors—is the subject of considerable disagreement.[256] The Supreme Court has never held directly that the right exists in a *state* misdemeanor prosecution,[257] and as a consequence counsel is not usually provided to indigent misdemeanants in the state court systems.[258] However, for Mississippi and the other states within the jurisdiction of the United States Fifth Circuit Court of Appeals,[259] it is apparent that the *Gideon* rule is operative by virtue of the decision in *Harvey v. Mississippi*[260] rendered in 1965. In striking down a guilty plea to "possession of whiskey," a misdemeanor under the Mississippi statute,[261] because Harvey had not been previously advised of his right to counsel, the court clearly expressed its intent of extending the *Gideon* rule to state misdemeanor charges.

> It is true that the cases which support appellant's argument [that *Gideon* applied in state misdemeanor prosecutions] all involved felony convictions, but their rationale does not seem to depend on the often purely formal distinction between felonies and misdemeanors. One accused of crime has the right to the assistance of counsel before entering a plea because of

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[253]*Id.* at 1626.

[254]*Id.* at 1630.

[255]For an exhaustive analysis of *Miranda* and its implications, see Part II of this article at 38 MISS. L. J. 57 (1966).

[256]See generally McKinzie, *The Indigent Defendant's Right to Counsel in Misdemeanor Cases*, 19 SW. L.J. 593 (1965).

[257]*But see* Evans v. Rives, 126 F.2d 633 (D.C. Cir. 1942), wherein the court held that a *federal* misdemeanant was entitled to appointed counsel except in a petty offense case.

[258]See generally 1 SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS (1965).

[259]Alabama, Florida, Georgia, Louisiana, Texas, and the Canal Zone.

[260]340 F.2d 263 (5th Cir. 1965). For an analysis of the *Harvey* decision, see Williams, *Federal Habeas Corpus and the State Courts*, 36 MISS. L.J. 520 (1965).

[261]MISS. CODE ANN. § 2613 (1956).

> the disadvantageous position of an unassisted layman in a court of law and because of the serious consequences which may attend a guilty plea. Such disadvantages and consequences may weigh as heavily on an accused misdemeanant as on an accused felon.[262]

After quoting with approval a portion of the opinion in *Evans v. Rives*,[263] which extended the right to appointed counsel to federal misdemeanants, the court said:

> While the rule as thus stated [in *Evans v. Rives*] has never been expressly extended to misdemeanor charges in state tribunals, it has been argued that such a principle is implicit in the Supreme Court's decision in *Gideon v. Wainwright* . . . . Be this as it may, the reasoning in *Evans* along with other recent right-to-counsel decisions persuades us that we should apply that rule in the present case.[264]

It appears, therefore, that Mississippi is confronted with the additional problem of furnishing counsel to those indigent misdemeanants who express a desire to "talk to a lawyer."[265]

Because there are no decisions specifically requiring the appointment of counsel in post-conviction matters, revocation hearings, and youth court proceedings,[266] those particular "new issues" raised and left unresolved by *Gideon* may be by-passed for the time being. The issue involving assistance in addition to counsel will be alluded to later.

The foregoing discussion indicates that the state of Mississippi is

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[262]340 F.2d 263, 269 (5th Cir. 1965).

[263]126 F.2d 633 (D.C. Cir. 1942).

[264]340 F.2d 263, 271 (5th Cir. 1965).

[265]The *Harvey* decision was reaffirmed in McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965).

[266]Subsequent to the preparation of this textual material, the United States Supreme Court decided *In re* Gault, 35 U.S.L. WEEK 4399 (U.S. May 15, 1967), holding that:

> [T]he Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parent must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child.

Id. at 4411. The *Gault* decision will require the appointment of counsel in an undetermined number of Youth Court proceedings in Mississippi, and dramatically magnifies the immediacy of the need to provide a better system for the representation of indigents in our state courts.

Id. at 862. The court, however, failed to advise the youth court as to what it should do if the minor were indigent but nevertheless requested counsel.

unquestionably obligated to provide counsel for indigent felons throughout the proceedings against them and is probably obligated to furnish the same assistance to indigent misdemeanants. With the requirements thus clearly spelled out, the focus of our inquiry now shifts to a consideration of the most effective and desirable means of fulfilling them. Generally speaking, there are two accepted methods of furnishing counsel to indigent criminal defendants: the assigned counsel system, and the public defender system. Each will be considered in the light of the particular requirements and problems of Mississippi, and recommendations concerning the implementation of each system will be made.

C. The Assigned Counsel System

The assigned counsel system, in one form or another, is presently in use in approximately 2900 of the 3100 counties in the United States.[267] It is a simple and, as operated in Mississippi, a relatively inexpensive method of providing counsel for indigent criminal defendants. In essence, when a felony defendant appears in court without an attorney and cannot afford to hire one, the circuit judge simply appoints one for him from the membership of the bar in that county. The specific authority for this appointment in Mississippi is section 2505 of the Code. Under this statute the circuit judge, in term time or in vacation, may appoint counsel to defend an indigent who has been indicted for a felony *or* who is merely in jail charged with a felony. If the indigent is charged with a capital felony the judge may appoint two attorneys to the case, but in noncapital felonies the appointment of only one attorney is authorized. The statute specifically provides that the appointed counsel shall have free access to the prisoner, that the defendant shall have the benefit of compulsory process to compel the attendance of witnesses in his favor, and that the defendant shall be entitled to consult with his counsel before pleading to the indictment.[268]

Generally speaking, every member of the Mississippi State Bar Association in active practice in this state is eligible for appointment with the following exceptions: the attorney general and the district attorneys are prohibited from defending or advising any person charged with a crime within this state;[269] the county attorney is prohibited from defending or advising anyone being prosecuted in the name of the state, his county, or a municipality of his county;[270] and the law partner

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[267] 1 SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 15 (1965).

[268] MISS. CODE ANN. § 2505 (1956).

[269] MISS. CODE ANN. § 2299 (1956).

[270] MISS. CODE ANN. § 3917 (1956).

of a district or county attorney is prohibited from defending criminal cases in courts within his partner's jurisdiction.[271] As a practical matter, however, certain of the circuit judges limit their appointments to those attorneys whom they feel are more experienced in criminal law.

Section 2505 provides for what can only be described as nominal compensation to the appointed attorney. For capital cases the following schedule obtains: for final settlement of the case without trial after indictment, $75.00; for final conclusion of the case by trial, either upon the merits or on the issue of insanity, $150.00; and for final conclusion of the case upon appeal to and decision by the state supreme court, $250.00. In noncapital felonies the respective fees are: $50.00; $100.00; and $200.00. Although, when measured in terms of the hours invested by appointed counsel the Mississippi fee schedule is ridiculously low, there are six states in which assigned counsel are not compensated at all![272] As a matter of fact, the general law is to the effect that an appointed counsel is not entitled to compensation in the absence of legislation such as section 2505.[273] The argument has been made a number of times by appointed counsel that the requirement of performing services for an indigent for a nominal compensation or for no compensation constitutes a taking of a property right in violation of the due process clause of the fourteenth amendment.[274] The courts that have ruled on this question, including the Mississippi court,[275] have uniformly held that no compensable taking has resulted from the required representation of the indigent.[276] The reasoning of these cases is best expressed in *United States v. Dillon*,[277] as follows:

> Representation of indigents upon court order is an ancient tradition of the legal profession, going as far back as fifteenth-century England and pre-Revolutionary America. And yet counsel appointed to represent indigents have rarely received anything more than statutory fees which generally do not pay a lawyer what he could get elsewhere for his services. Thus, when a court requires a lawyer to represent an indigent without any compensation, or for less compensation than he could get elsewhere, the court is merely requiring the lawyer to dis-

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[271] Miss. Code Ann. § 8672 (1956).

[272] 1 Silverstein, Defense of the Poor in Criminal Cases in American State Courts 16 (1965).

[273] See cases cited in United States v. Dillon, 346 F.2d 633, 637 (9th Cir. 1965).

[274] See cases cited in Weiner v. Fulton County, 113 Ga. App. 343, 347-48, 148 S.E.2d 143, 146 (1966).

[275] Dismukes v. Board of Supervisors, 58 Miss. 612 (1881).

[276] See cases cited in Weiner v. Fulton County, 113 Ga. App. 343, 347-48, 148 S.E.2d 143, 146 (1966).

[277] 346 F.2d 633 (9th Cir. 1965).

> charge an obligation which is part of the professional tradition he assumed upon becoming a lawyer. There is no 'taking.'[273] . . . . In short, the ancient, traditional obligation of lawyers to represent indigents on court order has, for most of the many years of its existence, been an obligation to serve without compensation, and has been modified by statute only to allow fees which generally do not give the lawyer what his time is worth . . . .[279]

It therefore appears that relief in the form of "just compensation" for the time and effort expended by appointed counsel must be sought through legislative rather than judicial channels. Recommendations for the amendment of section 2505 so as to provide a more reasonable schedule of compensation are contained in Appendix III.

However, in order to suggest means of improving—or for that matter, abolishing—the assigned counsel system in Mississippi, it is necessary to first learn as much as possible about its operation and function. Prior to 1966, no comprehensive study had ever been made of the Mississippi system or of the several factors which determine its effectiveness. For example, no one knew for sure just how many indictments are returned in the state each year, or how many felony cases are actually disposed of annually, or how many indigent appointments are made, or how many guilty pleas are entered, or even how much money is paid by the 82 counties in counsel fees to appointed lawyers. Arguments have been made from time to time that Mississippi should abolish the assigned counsel system and enact a public defender system,[280] but without factual information concerning the validity of the present system it would be extremely unwise to junk it in favor of a system about which equally little is known.

Therefore, in 1966, the Mississippi State Bar Association and the School of Law, University of Mississippi, applied for and received a grant from the National Defender Project to be used for the purpose of determining the most effective means of providing representation to indigents in the courts of Mississippi. This project is designed to be implemented over a period of three years in two interrelated phases: (a) an Administrator Program which has been placed in operation in the Nineteenth Circuit Court District; and (b) a Demonstration Defender Program which is in operation at the law school. The Demonstration Defender Program involves interested students of the law school as assistants to assigned counsel in the Nineteenth District, the Third

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[279] *Id.* at 638.

[280] See, *e.g.*, Ethridge, *Mississippi Needs a Public Defender System*, Public Administration Survey, Bureau of Governmental Research, University of Mississippi, Jan. 1966, p. 1.

[278] *Id.* at 636.

District, and the United States District Court for the Northern District of Mississippi. It also provides certain new courses in criminal procedure and practice at the law school and utilizes the resources of the law school to perform the research necessary to accomplish needed reforms in the system of representation and in the criminal process. It is anticipated that the total effort of the three year project will demonstrate the type of defender system best suited to the needs of Mississippi and its people. An extremely valuable by-product of the project will be the the training given the law students who participate in the program by actually assisting attorneys in the preparation of criminal cases.[281]

During the summer of 1966, the research phase of the project was directed toward a study of the present assigned counsel system in Mississippi. This study involved the gathering of data and statistics on the operation of the system and was accomplished in two ways: by a docket study of all felony cases handled in the 82 counties during the calendar year 1965; and by the use of questionnaires sent to the members of the Mississippi State Bar. Of some 2,000 such questionnaires sent out, 424 or 22 per cent were returned. Fifteen of the 21 circuit judges responded to a slightly different questionnaire. A special questionnaire was also sent to the district and county attorneys, to which 58 per cent of the district attorneys and 42 per cent of the county attorneys responded. Thus, the returns were exceptionally good for a group as large as that involved and the results embody a broad cross sampling of the bar members. In addition, the results also embrace a healthy majority of those officers most directly connected with the state criminal process. The information gained from the docket survey and the questionnaires should be invaluable in making the ultimate determination as to the most effective means of providing representation to indigent criminal defendants in Mississippi.

1. *The Results of the Docket Survey and Questionnaire*

The docket survey was performed in each of the eighty-two counties and was designed to furnish information as to the volume of felonies processed during calendar year 1965, and the effect of the assigned counsel system in this process. The information can best be set forth in tabular form.

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[281]At the end of January 1967, a total of 163 second-and third-year law students had participated in the program by serving for one week under the supervision of a practicing attorney in the preparation of a case. The students are assigned upon request of the attorney and spend one week performing functions under his direction. These functions include the interviewing of witnesses, legal research, and general leg work. The students receive no compensation but are reimbursed for their reasonable expenses.

TABLE 1

NUMBER OF INDICTMENTS, CASES HANDLED,* NUMBER INVOLVING RETAINED COUNSEL, APPOINTED COUNSEL AND SELF-REPRESENTATION, AND AMOUNTS PAID TO ASSIGNED BY COUNSEL BY COUNTIES

County	*No. of Indict.*	*No. of Cases**	*No. with Ret. Atty.*	*No. with App. Atty.*	*No. Self Rep.*	*Fees Paid App. Atty.*
ADAMS	28	15	9	4	2	$ 200.00
ALCORN	18	8	2	6	0	375.00
AMITE	8	1	0	0	1	0
ATTALA	70	36	12	13	11	575.00
BENTON	7	2	2	0	0	0
BOLIVAR	50	26	12	10	4	950.00
CALHOUN	25	9	6	3	0	175.00
CARROLL	14	10	0	0	10	0
CHICKASAW	36	18	10	8	0	225.00
CHOCTAW	7	5	1	3	1	125.00
CLAIBORNE	36	24	14	8	2	650.00
CLARK	12	8	5	1	2	75.00
CLAY	36	9	4	0	5	0
COAHOMA	53	19	2	17	0	1,150.00
COPIAH	39	21	8	8	5	150.00
COVINGTON	26	15	2	1	12	100.00
DE SOTO	49	19	16	2	1	125.00
FORREST	108	132	96	36	0	1,450.00
FRANKLIN	5	4	1	1	2	0
GEORGE	30	15	13	1	1	150.00
GREENE	3	5	2	1	2	150.00
GRENADA	35	39	16	21	2	975.00
HANCOCK	64	21	4	10	7	600.00
HARRISON	210	110	52	50	8	2,685.00
HINDS	218	106	62	41	3	2,335.00
HOLMES	33	28	6	21	1	1,600.00
HUMPHREYS	37	27	3	22	2	1,400.00
ISSAQUENA	2	3	0	1	2	150.00
ITTAWAMBA	13	1	1	0	0	0
JACKSON	159	106	73	33	0	1,275.00
JASPER	28	8	3	0	5	0
JEFFERSON	4	3	1	2	0	100.00
JEFFERSON DAVIS	16	5	2	3	0	125.00
JONES	135	61	36	22	3	1,300.00

County	No. of Indict.	No. of Cases*	No. with Ret. Atty.	No. with App. Atty.	No. Self Rep.	Fees Paid App. Atty.
KEMPER	8	3	1	0	2	0
LAFAYETTE	21	16	9	6	1	325.00
LAMAR	14	1	1	0	0	0
LAUDER-DALE	168	54	11	38	5	2,675.00
LAWRENCE	13	7	2	4	1	125.00
LEAKE	17	4	1	3	0	100.00
LEE	83	14	7	6	1	400.00
LEFLORE	120	37	10	27	0	1,400.00
LINCOLN	27	30	9	4	17	200.00
LOWNDES	115	50	7	0	43	0
MADISON	34	20	5	3	12	150.00
MARION	28	15	8	5	2	255.00
MARSHALL	35	18	7	11	0	575.00
MONROE	59	22	7	14	1	450.00
MONTGOMERY	9	9	4	5	0	300.00
NESHOBA	16	8	3	2	3	100.00
NEWTON	25	25	3	12	10	600.00
NOXUBEE	24	12	12	0	0	0
OKTIBBEHA	54	29	0	0	29	0
PANOLA	73	42	12	7	23	250.00
PEARL RIVER	21	31	23	4	4	100.00
PERRY	4	4	4	0	0	0
PIKE	52	56	33	9	14	375.00
PONTOTOC	30	9	1	6	2	300.00
PRENTISS	26	5	4	1	0	150.00
QUITMAN	39	31	5	20	6	1,001.00
RANKIN	42	38	10	21	7	1,300.00
SCOTT	39	21	3	10	8	500.00
SHARKEY	12	4	2	1	1	150.00
SIMPSON	26	13	12	1	0	75.00
SMITH	18	6	3	2	1	150.00
STONE	9	4	3	1	0	80.00
SUNFLOWER	40	32	8	24	0	1,475.00
TALLA-HATCHIE	43	19	5	3	11	175.00
TATE	18	13	8	1	4	150.00
TIPPAH	31	12	8	4	0	200.00
TISHOMINGO	18	12	11	1	0	175.00
TUNICA	5	4	2	2	0	350.00
UNION	20	19	13	5	1	450.00
WALTHALL	15	10	1	5	4	200.00

County	No. of Indict.	No. of Cases*	No. with Ret. Atty.	No. with App. Atty.	No. Self Rep.	Fees Paid App. Atty.
WARREN	102	58	31	17	10	1,125.00
WASHINGTON	118	99	36	63	0	3,275.00
WAYNE	18	13	12	0	1	0
WEBSTER	21	8	3	5	0	250.00
WILKINSON	10	9	7	1	1	50.00
WINSTON	29	13	3	5	5	250.00
YALOBUSHA	25	0	0	0	0	0
YAZOO	30	12	10	2	0	150.00

* "Cases Handled" means all cases actually disposed of during 1965, either by conviction, acquittal, guilty plea, or dismissal.

TABLE 2

VOLUME OF CASES, NUMBER OF APPOINTMENTS, AND FEES PAID ASSIGNED COUNSEL BY CIRCUIT COURT DISTRICTS, WITH RELEVANT PERCENTAGES

District	No. of Indict.	No. of Cases*	No. with Ret. Atty.	No. with App. Atty.	No. Self Rep.	Fees Paid App. Atty.
FIRST	247	71	33	34	4	$1,850.00
		29%*	46%#	48%#	6%#	
SECOND	283	135	59	61	15	3,365.00
		48%	44%	45%	11%	
THIRD	153	86	45	29	12	1,725.00
		56%	52%	34%	14%	
FOURTH	348	223	63	157	3	9,150.00
		64%	28%	70%	1%	
FIFTH	185	120	39	52	29	2,475.00
		65%	33%	43%	24%	
SIXTH	55	32	18	8	6	350.00
		58%	56%	25%	19%	
SEVENTH	282	138	77	46	15	2,635.00
		49%	56%	33%	11%	
EIGHTH	139	96	20	48	28	2,600.00
		69%	21%	50%	29%	
NINTH	152	89	47	27	15	2,075.00
		59%	53%	30%	17%	
TENTH	198	75	28	39	8	2,750.00
		38%	37%	52%	11%	

County	No. of Indict.	No. of Cases*	No. with Ret. Atty.	No. with App. Atty.	No. Self Rep.	Fees Paid App. Atty.
ELEVENTH	147	80	21	49	10	3,451.00
		54%	26%	61%	13%	
TWELFTH	112	136	100	36	0	1,450.00
		121%**	74%	26%		
THIRTEENTH	98	42	20	4	18	325.00
		43%	48%	10%	43%	
FOURTEENTH	133	117	51	26	40	925.00
		88%	44%	22%	34%	
FIFTEENTH	92	59	36	16	7	605.00
		64%	61%	27%	12%	
SIXTEENTH	237	103	24	0	79	0
		43%	23%		77%	
SEVENTEENTH	208	93	41	13	39	700.00
		45%	44%	14%	42%	
EIGHTEENTH	135	61	36	22	3	1,300.00
		45%	59%	36%	5%	
NINETEENTH	192	126	88	35	3	1,575.00
		66%	70%	28%	2%	
TOTALS FOR STATE	3,418	1,890	856	710	324	$39,531.00
		55%	45%	38%	17%	

* This percentage reflects the relationship of the number of cases disposed of to the number of indictments returned.

\# These percentages reflect the relationship of the number of cases with retained counsel, appointed counsel or self-represented to the number of cases disposed.

** The Twelfth District disposed of more cases in 1965 than there were indictments returned. Apparently a number of such cases involved continuances from previous terms of court.

The most surprising fact in the above tables is the small amount spent by the counties in providing legal assistance to indigents—only $39,531.00 for the whole year 1965. The average fee per case of only $55.68 indicates that the vast majority of appointed cases are settled rather than tried. This is an unreliable indicator of the value of the appointive services, however, for more often than not it is to the advantage of the client to negotiate a sentence with the district attorney rather than try the case and run the risk of a greater sentence being imposed upon conviction. In order, therefore, to validly assess the merit of the assigned counsel system, the docket study included an analysis of the plea bargaining results obtained by retained counsel, assigned counsel, and those defendants who represented themselves.

TABLE 3

VOLUME AND DISPOSITION OF NEGOTIATED GUILTY PLEAS OBTAINED BY RETAINED COUNSEL, APPOINTED COUNSEL AND SELF REPRESENTED DEFENDANTS IN STATE DURING 1965

Method of Representation	*No. of Negotiated Pleas*	*Percentage of* Defs. pleading guilty to principal offense*	*Percentage of Defs. pleading guilty to lesser offense*
RETAINED COUNSEL	739	88.80%	11.20%
APPOINTED COUNSEL	619	88.09%	11.91%
SELF-REPRESENTED	320	94.07%	5.93%
MEDIAN		89.16%	10.84%

* In assessing the value of the above table it should be noted that the number of guilty pleas to the principal offense includes pleas on which the defendant was given a suspended sentence or probation.

It appears from the above table that appointed counsel more than hold their own with retained counsel insofar as negotiating pleas to lesser offenses is concerned. The conclusions derived from Table 3 reinforce the assumptions entertained by the circuit judges concerning the skill of assigned counsel. Seventy-one per cent of the judges responding to the questionnaire thought that assigned counsel's preparation of the case was "adequate" and 28 per cent of the judges thought that such preparation was "very adequate." The prosecutors generally agreed with this assumption and considered the assigned counsel's knowledge of criminal procedure to be adequate. It is interesting, however, that 36 per cent of the responding members of the bar—those who actually receive the appointments—thought assigned attorneys generally were unfamiliar with the practice and procedural aspects of criminal law. A summary of the questions asked and an analysis of the answers follows.

1. *How is indigency determined?* Seven out of the fifteen responding judges stated that they conducted no examination of an accused other than questioning him about his resources. In at least one district, the district attorney is given an opportunity to cross-examine the accused relative to his claim of indigency. In addition to an oral examination of the accused, the remaining eight judges regularly utilize various other sources such as the sheriff's office, the welfare department, the circuit clerk's office, and probation officers. Most of the judges and district attorneys indicated that the determination of indigency in rural counties is relatively simple since the accused is generally known in the community or, if he is not known, his background can be easily checked. Two judges indicated, however, that the short length of time available

in which to make such determination rendered most background checks superficial.

The response of the practicing attorneys to this question was quite surprising. Fifty-two per cent of the attorneys felt that under the present system the determination of indigency was inaccurate. When asked what effort they made to check the accuracy of the determination, however, 60 per cent of the attorneys indicated that they assumed without investigation that the client assigned to them had no available funds with which to retain counsel.

If nothing else, the answers to this question indicate a complete absence of any uniform standard for determining indigency and a lack of an effective methodology for ascertaining the accused's true financial status. It is suggested therefore, that an affidavit similar to that developed by Judge Leon F. Hendrick of the Seventh District and reproduced in Appendix IV should prove of value in discovering the financial resources of the accused. Then, if the information in the affidavit indicates that the accused cannot, either from his own resources or from family members, raise an amount equal to the minimum fee charged by the local bar for his type of case, a determination can justifiably be made that the defendant is an indigent.

2. *What Method is Used in Assigning Counsel?* In a majority of the districts assigned counsel are selected from a panel of attorneys on a rotating basis. This panel is usually prepared by a committee of the local bar association although in two districts the panel is prepared by the judge. Two judges indicated that selections are made "at random." They felt that this form of selection was more equitable to the attorneys since the time previously spent by such attorney on an appointed case was a consideration in the making of a subsequent assignment. Eight of the judges indicated that they spread assignments among all lawyers in "active practice" in their district, but seven judges stated that they limited their assignments to those attorneys who they felt were qualified in criminal law.

3. *When is Counsel Appointed?* Section 2505 requires that a defendant shall be entitled to the advice of his appointed counsel before he is required to plead to the indictment.[282] In general, therefore, the responses to the questionnaire indicated that appointment is made prior to formal arraignment. Four of the judges stated that they regularly appointed counsel as soon after arrest as possible for those defendants charged with serious crimes, and six others indicated that they occasionally did so. The response of the bar to this question was quite interesting: 40 per cent of the bar thought counsel in their county were assigned

[282]MISS. CODE ANN. § 2505 (1956).

"somewhat too late" and 24 per cent felt that such assignments were made "very much too late." Surprisingly enough, 40 per cent of the county attorneys thought that assignments were made either "somewhat too late" or "very much too late."

It must be remembered that the responses to the questionnaire were returned prior to the decision in *Miranda v. Arizona.* It is highly probable, therefore, that a much greater percentage of indigents are presently receiving assigned counsel shortly after arrest. It is suggested that ample authority for such early appointment is contained in section 2505, which provides that *"where any person is in jail charged with a capital crime,* or is indicted for such crime,"[283] the judge, being satisfied that the person is an indigent, may appoint counsel. (Emphasis added). In order to adequately meet the *Miranda* requirements, however, it is suggested that section 2505 be amended as indicated in Appendix III.

4. *Is the Assigned Counsel System Fair?* The fee schedule provided by section 2505 was the source of the most criticism of the system. Thirty-nine per cent of the responding bar members felt that the fee allowance in an assigned case constituted a "serious hardship" on the attorney. Fifty-four per cent thought that the fee allowance was a "hardship but not a serious one." Only 7 per cent of the bar felt that the fee allowance constituted no hardship on the attorney. All of the respondents, including the prosecutors, believed that the absence of any statutory authority for reimbursing counsel for expenses incurred in the preparation and trial of the case was unfair to both attorney and his client.

2. *Conclusions and Recommendations*

The results of the docket study and questionnaire indicate that the principal advantages of the present assigned counsel system in Mississippi are its simplicity and the nominal cost of its operation. Also, based on the study report which indicates that the services rendered by appointed counsel are generally adequate, the system seems to get the job done in most instances, but at a considerable cost in time and money to the attorneys who are appointed.

The obvious disadvantages of the system are: an absence of specific statutory authority for early appointment under the *Miranda* rule; an unfair compensation schedule; and a complete lack of authority to reimburse assigned counsel for expenses incurred in the preparation of the case or for the services of investigators and experts. An amendment of section 2505 is necessary in order to remedy these deficiencies. It is suggested that the amendment proposed in Appendix III would

[283] *Ibid.*

provide an assigned counsel system which would be effective, would be fair, and would assure compliance with present constitutional requirements.

There is no assurance, however, that even the proposed assigned counsel system is the most desirable one for Mississippi. The cost of operating it would be much greater than the present system, perhaps soaring as much as $500,000 per year. In addition, the inherent weakness of the system—the fact that too often young, inexperienced lawyers are appointed—will still be present. Perhaps an alternative system—the public defender system—should be given serious consideration.

D. The Public Defender System

Essentially, a public defender system is one in which full-time or part-time attorneys are paid a salary by the state, a county, or a municipality to represent indigent criminal defendants. These attorneys are on call at all times and are more easily able to furnish assistance to indigents during the critical first stages of the criminal process than is possible under an assigned counsel system.

The first public defender office in the United States was established in Los Angeles County, California, in 1914. By 1965, the number of public defender offices had grown to 117, providing service in 178 counties of the country. The public defender systems of five states—Massachusetts, Rhode Island, Connecticut, Delaware, and Florida—are state wide in scope. Other systems, such as those in California, Illinois and Indiana, are organized only in the more populous counties of the state. Although many of the defender offices in large metropolitan areas employ full-time attorneys, a high proportion of defender positions are part time.[284]

The advantages and disadvantages of a public defender system are analyzed in exhaustive detail in a study performed by the American Bar Foundation and published in 1965.[285] The principal advantage of the defender system is that it provides competent, experienced defense counsel who are available upon call to render defender services.[286] The primary disadvantage is the relatively greater cost of the defender system over the assigned counsel system, particularly in rural areas.[287]

The effectiveness of the defender system was the subject of considerable attention by the American Bar Foundation study. An ex-

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[284]The foregoing is summarized from 1 SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS 39-42 (1965).

[285]1 SILVERSTEIN, DEFENSE OF THE POOR IN CRIMINAL CASES IN AMERICAN STATE COURTS (1965).

[286]*Id.* at 46.

[287]*Id.* at 63.

haustive analysis was made of the defender system and the assigned counsel system, and each was compared with the other and with retained counsel. The results were largely inconclusive, although there was some indication that public defenders were somewhat less effective in obtaining acquittals or reduced sentences than were retained counsel.[288] As to the relative effectiveness of the defender system and the assigned counsel system, the report concluded:

> In the light of this comparative analysis, no firm conclusions can be drawn as to whether assigned counsel systems are better than defender systems, or vice versa. In general, assigned counsel systems appear to cost less in smaller counties, while defender systems cost less in larger counties; however, some defender systems cost less in smaller countries, and some assigned counsel systems cost less in larger counties. Nevertheless, it is probably fair to say that, in metropolitan areas, a defender system is more economical if assigned counsel are compensated at a reasonable rate.
>
> Factors other than cost must also be considered in making a choice of system. On the matter of performance of counsel, as shown by final disposition of cases in the docket study, the results are equally inconclusive.[289]

In 1965, Honorable Orma R. Smith, then President of the Mississippi State Bar Association, appointed a Public Defender Committee for the purpose of considering the desirability of instituting a public defender system in Mississippi.[290] After analyzing the defender systems in operation in other states and comparing the effectiveness of such systems with the peculiar needs and problems of Mississippi, the Committee concluded to recommend to the Association that it work for the enactment of a public defender system in this state.[291] The Committee then drafted a proposed public defender act which it deemed best suited for the needs of Mississippi. The draft legislation, which is incorporated in Appendix V, provides for a state-wide public defender system, with a public defender being elected for each circuit court district. The defender would possess the same qualifications as the district attorney and would be compensated on the same basis. Provision is made for the appointment of assistants in certain of the larger districts,[292] and both the defender and the assistants would be paid

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[288] *Id.* at 55.

[289] *Id.* at 73.

[290] The Public Defender Committee has been continued in the administration of Honorable John Armstrong, current President of the State Bar Association.

[291] See *Report of Public Defender Committee*, 37 Miss. L.J. 593 (1966).

[292] According to the 1960 federal census the population of the several districts

out of the state treasury.[293] An important feature of the draft is the provision for the payment of investigative and expert services. These payments would be allowed by the circuit judge upon motion of the public defender and would be made out of the county treasury in an amount not to exceed a total of $300.00. There is also a provision for the appointment of counsel in certain instances wherein the public defender is overburdened or is representing clients with conflicting interests. Perhaps the most interesting feature of the draft is the provision creating a lien on the property of the defendant. This lien is enforceable by the several public defenders and the proceeds therefrom are utilized to reimburse the state to defray the costs of the system.

E. Conclusion

The study performed in 1966 under the grant from the National Defender Project indicates a critical need for major changes in the

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and the number of assistants provided for each under the draft are:

District	1960 Population	Number of Assistants
First	163,974	1
Second	140,541	1
Third	120,410	1
Fourth	217,719	2
Fifth	102,490	1
Sixth	86,056	0
Seventh	251,602	2
Eighth	114,613	1
Ninth	67,365	0
Tenth	99,870	0
Eleventh	138,521	1
Twelfth	61,467	0
Thirteenth	65,303	0
Fourteenth	102,385	1
Fifteenth	83,134	0
Sixteenth	120,850	1
Seventeenth	107,403	1
Eighteenth	59,942	0
Nineteenth	74,986	0

[293]Assuming that, as provided by section 4 of the draft, the public defenders elect to perform their official duties on a part-time basis (as do most of the district attorneys), the annual cost to the state of the public defender system is estimated as follows:

19 public defenders at $8,500	$161,500.00
13 assistants at $5,500	71,500.00
Travel allowance for 32 defenders and assistants at $500	16,000.00
Total annual cost	$249,000.00

present system of providing representation for indigents in Mississippi. These changes can take one of two directions: an improved, more effective assigned counsel system; or the institution of a public defender system. The suggestions and recommendations made in this article do not pretend to be authoritative. As indicated earlier, one would be presumptuous to suggest pat answers or packaged solutions to so complex a problem as that of providing representation for indigents within the expanding constitutional guidelines. However, since any upgrading of the present system will involve a considerably greater annual expenditure by the state or counties, everyone involved with the criminal process—indeed every taxpayer—ought to give serious consideration to the several alternatives.[294]

Appendix III

AN ACT TO AMEND SECTION 2505, MISSISSIPPI CODE OF 1942, TO PROVIDE FOR COMPENSATION TO APPOINTED COUNSEL AND FOR OTHER RELATED PURPOSES.

Be It Enacted by the Legislature of the State of Mississippi:

Section 1. Section 2505, Mississippi Code of 1942, Recompiled, is amended to read as follows:

§ 2505. In Capital Cases Copy of Indictment and Special Venire Served to be Given—Counsel Assigned in Felony Cases.

1. Any person indicted for a capital crime, shall, if demanded by him by motion in writing before the completion of drawing of the special venire, have a copy of the indictment and list of the special venire summoned for his trial delivered to him or his counsel at least one (1) entire day before said trial.

2. Where any person is in jail charged with a felony or is indicted for such crime, and the court being first satisfied that such person is unable to employ counsel, such person shall be allowed counsel, not exceeding two (2) in capital cases and not exceeding one (1) in non-capital cases, to be chosen for him by the judge in vacation or by the court to defend such person in the proceedings against him.

3. An attorney appointed pursuant to this section shall, at the conclusion of the representation or any segment thereof, be compensated at a rate not exceeding $15 per hour for time expended in court, in-

[294]Apparently the majority of the bar has already considered the matter and concluded that the state should adopt a public defender system. When asked their reaction to the establishment of a full- or part-time public defender system in Mississippi, seventy-four percent of the responding lawyers indicated they would favor such a system. Interestingly, 65% of the prosecutors and 57% of the circuit judges replied that such a system would be acceptable to them also.

cluding the preliminary hearing, and $10 per hour for time reasonably expended out of court, and shall be reimbursed for expenses reasonably incurred. Each claim shall be supported by a written statement specifying the time expended, services rendered, and expenses incurred while the case was pending. The court shall, in each instance, fix the compensation and reimbursement to be paid to the attorney and shall allow the payment thereof out of the general fund of the county. For representation of a defendant at the preliminary hearing and in the circuit court, the compensation to be paid to an attorney shall not exceed $500 in a case in which one or more felonies are charged. For representation of a defendant in the Mississippi Supreme Court, the compensation to be paid to an attorney shall in no event exceed $300.00.

4. Counsel for a defendant who is financially unable to obtain investigative, expert, or other services necessary to an adequate defense in his case may petition the court for permission to incur such expenses, setting forth the necessity of such services to an adequate defense, the name, address, and qualifications of the person or persons who will render such services, a description of the services to be rendered, and the estimated amount of such expenses. Upon finding after appropriate inquiry that the services are necessary and that the defendant is financially unable to obtain them, the court shall authorize counsel to obtain them on behalf of the defendant. The court may, in the interests of justice, and upon a finding that timely procurement of necessary services could not await prior authorization, ratify such services after they have been obtained. The court shall determine reasonable compensation for the services and direct payment out of the general fund of the country to the person or persons who rendered them upon the filing of a claim for compensation supported by an affidavit specifying the time expended, services rendered, and expenses incurred on behalf of the defendant. The compensation to be paid to a person for such services shall not exceed $300.00.

Section 2. This act shall take effect and be in force from and after its passage.

Appendix IV

STATE OF MISSISSIPPI
COUNTY OF_____ } *AFFIDAVIT OF INDIGENCY*

I, _____, being first duly sworn, say:

My home address is _____.

I am _____ years of age and I am single ( ) married ( ).

I have _____ children, ages _____.

I was employed by _____ at the time of my arrest.
Address of employer _____.
I was employed for _____ years ( ) months ( ) prior to my arrest.
My average weekly wage for the past year was $_____.
I presently have $_____ in cash; $_____ in savings bonds or accounts; $_____ in debts owed me by _____.
I own real estate valued at $_____; an automobile valued at $_____; and other personal property valued at $_____.
I presently am indebted in the approximate amount of $_____.
I am receiving the following payments: Social Security, $_____; Workmen's Compensation, $_____; Welfare Aid benefits, $_____; Veterans benefits, $_____; Other income, $_____.

I am and have been unable to pay an attorney's fee and I am and have been unable to hire an attorney to represent me in this case. No member of my family is able to help me employ an attorney.

_____

Sworn to and subscribed before me on this _____ day of _____, 196___.

_____

Appendix V

AN ACT TO PROVIDE FOR A SYSTEM OF PUBLIC DEFENDERS: TO PROVIDE FOR THE SELECTION, QUALIFICATIONS, TERM OF OFFICE, DUTIES AND COMPENSATION OF SUCH PUBLIC DEFENDERS: TO AMEND SECTION 2505, MISSISSIPPI CODE OF 1942: AND FOR OTHER RELATED PURPOSES BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

Section 1. Public Defender; Election; Term of Office. There is hereby created and established a system of Public Defenders in the State of Mississippi. There shall be a Public Defender for each of the Circuit Court Districts. The Public Defender shall be elected at the general election by the qualified electors of their respective Circuit Court Districts as other state officials are elected and shall serve for a term of four years, and until their successors are elected and qualified. The Circuit Judge of each Circuit Court District shall make an interim appointment until such general election.

Section 2. Qualifications of Public Defender. The Public Defender shall possess the same qualifications as are provided by law for the office of District Attorney.

SECTION 3. DISABILITIES OF PUBLIC DEFENDER. The compensation shall be subject to the same restrictions and disabilities as are provided by law for the office of District Attorney.

SECTION 4. *Compensation of Public Defender.* The compensation of the Public Defender shall be in the same amount and payable in the same manner as is provided by law for the office of the District Attorney.

SECTION 5. ASSISTANT PUBLIC DEFENDERS IN CERTAIN DISTRICTS. In any Circuit Court District now or hereafter having a population of not less than 100,000 and not more than 200,000, according to the latest federal census, there shall be one assistant to the Public Defender; in any Circuit Court District now or hereafter having a population of not less than 200,000 and not more than 300,000, according to the latest federal census, there shall be two assistants to the Public Defender; and in any Circuit Court District now or hereafter have a population of not less than 300,000 and not more than 400,000, there shall be three assistants to the Public Defender. Said assistants, including any successor or successors, shall be appointed by the Public Defender with the approval of the Circuit Judge of said District. Said assistants shall possess the same qualifications and shall be subject to the same disabilities and restrictions as are provided by law for the Public Defender and shall have the power and authority, under the direction and supervision of the Public Defender, to perform all of the duties required of that office. Said assistants may be removed at the discretion of the duly elected and acting Public Defender, or for cause by the Circuit Judge of said District. The salary of each of said assistants shall be five thousand, five hundred ($5,500) per annum, payable in the same manner as is the salary of the Public Defender.

SECTION 6. DUTIES OF PUBLIC DEFENDER. The Public Defender shall represent any person who is determined to be insolvent as provided in this act, who is under arrest for, or is charged with, a crime as defined by Section 8 of this act, if such a person requests such representation or if the court, on its own motion, so orders and such person does not knowingly, understandingly, and intelligently waive the opportunity to be so represented. The clerk of the court conducting such proceedings is directed to make such proceedings a matter of record.

The Public Defender may, with the consent of the trial court, but without compensation by the state, accept the voluntary services of members of the Mississippi bar in good standing in the defense of an insolvent person.

The Public Defender shall give priority and preference to his duties under the provisions of this act and may engage in the private practice

of law only to the extent that it will not interfere with or prevent performance of his duties as Public Defender and shall not otherwise engage in the practice of criminal law.

SECTION 7. DETERMINATION OF INSOLVENCY. The determination of insolvency of any accused person shall be made by the court and may be done at any stage of the proceedings. The Public Defender shall be allowed process of the court to summon witnesses to testify before the court concerning the financial ability of any accused person to employ counsel for his own defense.

If the trial court shall determine and adjudge, within one year after the determination of insolvency, that any accused was erroneously or improperly determined to be insolvent the District Attorney may, in the name of the state, proceed against such accused for the reasonable value of the services rendered to the accused and including all costs paid by the state or county in his behalf. Any amount recovered shall be deposited in the general revenue fund to the account from which the expenses of the office of Public Defender are paid.

SECTION 8. DEFINITION OF CRIME. For purposes of this bill a "crime" shall mean a felony.

SECTION 9. EMPLOYMENT OF CLERICAL HELP AND OTHER STAFF: METHOD OF PAYMENT. The Public Defender may employ investigators, secretaries, and other clerical help as funds available may permit and as otherwise provided by law. Each of the counties of this state is empowered to expend moneys in furtherance of the provisions of this act.

In addition, any member of the bar in good standing may register his or her availability with the Public Defender of each district for acceptance of special assignments to represent insolvent defendants in accordance with the provisions of Section 12 of this act.

SECTION 10. EXPENDITURES FOR PUBLIC DEFENDER'S OFFICE. All payments for the salary of the Public Defender and the necessary expenses of his office, including salaries of his assistants and staff, shall be considered as being for a valid public purpose. The salary and necessary travel expenses of the Public Defender and his assistants shall be paid from state funds as appropriated by the legislature.

SECTION 11. SERVICES OTHER THAN COUNSEL. Upon finding in an *ex parte* proceeding that investigative, expert or other services are necessary and that the defendant is financially unable to obtain them, the court shall authorize the Public Defender or assigned counsel to obtain the services on behalf of the defendant. The court shall determine reasonable compensation for the services and direct payment out of the general fund of the county, to the person who rendered them or to the

person entitled to reimbursement. Only in extraordinary circumstances may the court provide for compensation in excess of three hundred dollars.

Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

SECTION 12. CONFLICT OF INTERESTS; APPOINTMENT OF COUNSEL. The court shall appoint separate counsel for defendants who have such conflicting interests that they all cannot properly be represented by the Public Defender, or when other good cause is shown. If at any time after the appointment of counsel the court having jurisdiction of the case finds that the defendant is financially able to obtain counsel or to make partial payment for the representation he may terminate the appointment of counsel or authorize payment as provided by Section 13 of this act, as the interests of justice may dictate.

SECTION 13. COMPENSATION OF APPOINTED COUNSEL. An attorney appointed pursuant to Section 12 of this act shall, at the conclusion of the representation or any segment thereof, be compensated at a rate of $15.00 per hour for time reasonably expended in such representation, and shall be reimbursed for expenses reasonably incurred. Where a defendant is charged with one or more felonies, compensation in excess of expenses shall not exceed $500.00 for all such representation, including that related to an appeal or other post-conviction procedure.

Such compensation and reimbursement shall be fixed by the Circuit Court and shall be paid out of the general fund of the county. In extraordinary circumstances the court may provide for compensation in excess of the foregoing limits.

Each claim for compensation and reimbursement shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

No counsel assigned hereunder shall seek or accept any fee for representing the defendant for whom he is assigned without approval of the court as herein provided.

SECTION 14. LIEN CREATED ON DEFENDANT'S PROPERTY. There is hereby created a lien, enforceable as hereinafter provided, upon all the property, both real and personal, of any person who is receiving or has received any assistance from any counsel or other services provided by this bill. Such assistance shall constitute a claim against the applicant and his estate, enforceable according to law in an amount to be de-

termined by the court in which such assistance was rendered. Immediately after such assistance is rendered and upon determination of the value thereof by the court, a statement of claim showing the name and residence of the recipient shall be filed for record in the office of the clerk of the circuit court in the county where the recipient resides and in each county in which such recipient then owns or later acquires any property. Said liens shall be enforced on behalf of the State of Mississippi by the several Public Defenders. Said liens shall be utilized to reimburse the state to defray the costs of the system. The lien herein created shall be a continuing obligation, irrespective of any statute of limitations.

SECTION 15. ACCEPTANCE OF GIFTS AND SERVICES. Subject to the prior approval of the Circuit Judge, the Public Defender may accept gifts, grants or services from, or contract with nonprofit organizations, educational institutions and other state or federal agencies for the purposes of rendering legal aid to insolvent persons and for the purpose of studying, surveying and reporting on the need, use and availability of such aid in the State of Mississippi. The Public Defender or appointed counsel, with the concurrence of the Circuit Judge, may accept the assistance of students of the University of Mississippi School of Law participating in any training program sponsored by such School.

SECTION 16. SECTION 2505 AMENDED. Section 2505, Mississippi Code of 1942, Recompiled, is amended to read as follows:

§ 2505. In Capital Cases Copy of Indictment and Special Venire Served to be Given.

Any person indicted for a capital crime, shall, if demanded by him by motion in writing before the completion of drawing of the special venire, have a copy of the indictment and list of the special venire summoned for his trial delivered to him or his counsel at least one (1) entire day before said trial.

SECTION 17. SAVINGS CLAUSE. If any provision of this act or the application of such provision to any person, body or circumstance shall be held invalid, the remainder of this article or the application of such provision to persons, bodies or circumstances other than those concerning which it shall have been held invalid shall not be affected thereby.

SECTION 18. EFFECTIVE DATE. This act shall take effect and be in force from and after July 1, 1968.

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STUDENT COMMENTS

ESTATE TAXATION—INCLUSION OF GIFTS IN THE ESTATE OF THE TRANSFEROR UNDER SECTION 2036

I. Introduction

Of the several sections of the Internal Revenue Code dealing with estate taxes, sections 2033 through 2042 designate the items to be totaled in order to determine the gross value of a decedent's estate—the first step in the computation of estate taxes due the federal government. Sections 2035 through 2038 are only applicable to estates where the decedent has made gifts during lifetime. These sections are the four "woe-unto-you" statutes which have thwarted the intentions of many who, but for the statutes, would have reduced their taxable estates during lifetime by making gifts of property or securities—either outright or in trust. In recent years sections 2035-38 have been of particular interest to draftsmen, judges, and to the Commissioner of Internal Revenue. Section 2035 adds to the value of any estate, for taxing purposes only, the value of any gift made in contemplation of death. Section 2037 taxes inter vivos transfers wherein the donee is entitled to obtain possession or enjoyment only by outliving the donor (if the donor's interest amounts to at least a five per cent reversion). Section 2038 is aimed at revocable or amendable trusts; thus, where the power to alter or revoke the trust remains in the donor, the value of the trust property will be taxed in the deceased donor's estate thereunder.

Although the constructions and interrelation of the four sections are tremendously important to estate planners, the subject of this paper will be limited primarliy to section 2036, which makes retained interests or rights includible. Section 2036 provides:

> (a) General Rule—The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death—
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> (1) the possession or enjoyment of, or the right to the income from the property, or
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> (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.[1]

[1] Int. Rev. Code of 1954, § 2036.

It is apparent from the language of the statute that property which is subject to traditional forms of retention of use and enjoyment, such as retained life estates, is included in the grantor's gross estate. Similarly a lifetime reservation of the income from an inter vivos trust would be included. However, a review of the cases indicates that the Commissioner has often stretched section 2036 to cover instances of retained "possession or enjoyment" without reference to traditional forms of property interests or ownership.[2] Examples of such property relationships responsible for bringing the value of the transferred property back into the transferor's taxable estate are: (1) reciprocal trusts;[3] (2) trusts to discharge legal obligations of the transferor;[4] (3) powers to allocate trust funds;[5] (4) survivorship annuities;[6] and (5) combined annuity-life insurance policies.[7]

It is clear that the theory underlying the policy expressed in section 2036 is that the retention by the transferor of possession or enjoyment, or the retention of the right to alter enjoyment, is tantamount to retention of the property itself.[8]

II. Time of Transfer as Affecting Application of Section 2036

In determining whether a transfer is taxable it is imperative to consider the date of the gift. In some instances, a matter of hours may have caused the gift to be includible since the congressional actions are designated to become effective at certain hours on certain dates.

Congress enacted the first federal estate tax law in 1916, which provided that transfers "intended to take effect in possession or enjoyment at or after . . ." the death of the transferor were to be includible in the gross estate of the decedent.[9] In 1930 the United States Supreme Court held in the case of *May v. Heiner*[10] that a gift transfer, with retained life interest, was not taxable under the Code section which included transfers intended to take effect in possession or enjoyment at or after the death of the transferor. The Court reaffirmed that decision

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[2]See, *e.g.*, Silverman v. McGinnes, 259 F.2d 731 (3d Cir. 1958).

[3]Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950).

[4]Mathilde B. Hooper, 41 B.T.A. 114 (1940).

[5]State St. Trust Co. v. United States, 263 F.2d 635 (1st Cir. 1959).

[6]Forster v. Sauber, 249 F.2d 379 (7th Cir. 1957).

[7]Conway v. Glenn, 193 F.2d 965 (6th Cir. 1952); Burr v. Commissioner, 156 F.2d 871 (2d Cir. 1946). But see Fidelity-Philadelphia Trust Co. v. Smith, 356 U.S. 274 (1958) *reversing* 241 F.2d 690 (3d Cir. 1957); Bohnen v. Harrison, 199 F.2d 492 (7th Cir. 1952), *aff'd mem.*, 345 U.S. 946 (1953).

[8]Warren & Surrey, Federal Estate and Gift Taxation 258(b) (1961).

[9]Revenue Act of 1916, ch. 463, § 202(b), 39 Stat. 777.

[10]281 U.S. 238 (1930).

in 1931,[11] prompting the immediate passage of the Joint Resolution of Congress on March 3, 1931,[12] which formed the basis for the present language of section 2036 to include such interests. Further, the Revenue Act of 1932[13] made some clarifying changes in the wording of the 1931 Resolution and added the present provision that the retained interest required for taxability could be for life, *or* "any period not ascertainable without reference to [transferor's] death," and that the right to designate possession or enjoyment might be "either alone or in conjunction with any person." The Joint Resolution of 1931 and the amendments of 1932 were not retroactive.[14]

The decision in *May v. Heiner*[15] had emasculated that part of the estate tax law which rendered includible any property in which a life interest had been reserved. In 1949, the Supreme Court in *Commissioner v. Estate of Church*[16] overruled *May* and held that a reserved life interest rendered the property taxable as a transfer intended to take effect in possession or enjoyment at death. Thus, under the 1949 decision all transfers with reservation of a life interest made after 1916 became taxable as transfers taking place at death. Transferors, comfortable with their pre-1930 retained life interests and armed with the *May* decision and the non-retroactivity of the 1931-32 amendments, were suddenly faced with the possibility of taxation, just as though *May v. Heiner* had never been decided.

Fortunately, Congress abated the confusion after the *Church* decision with the Technical Changes Act of 1949.[17] This Act abrogated the *Church* decision for transferors dying before 1951, unless a reversionary interest had been retained. It also allowed transferors to release any retained interests prior to 1951 without the possibility of inclusion because of the contemplation of death section.[18] By the Technical Changes Act of 1953,[19] Congress removed even the 1951 deadline upon transferors dying after 1939 imposed by the 1949 Act, the rule thereby reverting back to the law prior to *Church*.

Section 2036(b), as it appeared in the 1954 Code, limits the application of section 2036(a) to transfers made after March 3, 1931, and provides that transfers made after March 3, 1931, and before June

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[11]Burnet v. Northern Trust Co., 283 U.S. 782 (1931); McCormick v. Burnet, 283 U.S. 784 (1931); Morsman v. Burnet, 283 U.S. 783 (1931).

[12]Ch. 454, 46 Stat. 1516.

[13]Ch. 209, § 803, 47 Stat. 279.

[14]Hassett v. Welch, 303 U.S. 303 (1938).

[15]281 U.S. 238 (1930).

[16]335 U.S. 632 (1949).

[17]Ch. 720, § 7, 63 Stat. 894.

[18]Ch. 720, § 8, 63 Stat. 896.

[19]Ch. 512, § 207, 67 Stat. 623.

7, 1932, will be taxed only if falling within the amended language of the 1931 Resolution. The current Regulations[20] explain that the 1932 amendment, in regard to retention of interest by the decedent for a period not ascertainable without reference to the transferor's death, applies to the case where "a decedent reserved the right to receive the income from transferred property in quarterly payments, with the proviso that no part of the income between the last quarterly payment and the date of the decedent's death was to be received by the decedent or his estate. . . ." Thus, by simple language that loophole was effectively closed. In addition, the Regulations[21] explain that where "a decedent reserved the right to receive the income from transferred property after the death of another person who was in fact enjoying the income at the time of the decedent's death" the value would be taxable, since the period is ascertainable only by reference to the transferor's death. There has been considerable controversy over the effect of the latter regulation upon the transferor's reserving a secondary life estate prior to June 7, 1932—the date the provision of "ascertainable without reference to decedent's death" came into the statute. The Fifth Circuit Court of Appeals held in *Hubbard v. Commissioner*[22] that the new language of the 1932 amendment alone allowed taxation of the value of the secondary life estate, and that such a future life estate was not taxable if the transfer occurred prior to the 1932 amendment. The Second Circuit's view in *Commissioner v. Arents*[23] is contra, making such transfer prior to the 1932 amendment taxable to the grantor's estate.

Until the 1932 Act became effective, a transfer, with retained power in the transferor to change the possession or enjoyment, but only in concurrence with another person, would not have been includible in the gross estate.[24] A retained power in concurrence with another person will be taxed under the current 1954 Code.[25] This is true whether or not the other person is one with a "substantial adverse interest"—the test often used in connection with gift tax statutes.[26]

III. Retained Possession or Enjoyment of Income

It is clear from the language of section 2036(a) that the transferor's estate will be taxed on the value of a gift even though he has retained

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[20]Treas. Reg. § 20.2036-1(b)(i) (1958).
[21]Treas. Reg. § 20.2036-1(b)(ii) (1958).
[22]250 F.2d 492 (5th Cir. 1957).
[23]297 F.2d 894 (2d Cir. 1962).
[24]Treas. Reg. § 20.2036-1(a)(ii) (1958).
[25]*Ibid.*
[26]See Lowndes & Kraemer, Federal Estate and Gift Taxes 153 (2d ed. 1962).

no right to the income from the property, but has retained only the "possession or enjoyment" privilege. In the event of non-income producing property, it therefore appears that any retention of the right to benefit will cause section 2036(a) to operate.

The word "enjoyment," as used in 2036(a) has been defined as "substantial present economic benefit."[27] Apparently no more explicit definition of the term has been formulated by the courts.[28] The recent case of *Union Planters Nat'l Bank v. United States*[29] points up significant areas of doubt as to the meaning of "possession or enjoyment." In *Union Planters* the decedent, during his lifetime, conveyed his interest in a jointly owned home to his wife. He continued to live in the home as in years passed. In the district court the government contended that "the court must find an express or implied agreement between [the decedent] and his wife that he would continue to live in the residence and have possession and enjoyment of it; and that, even if such an agreement is not to be inferred, the fact that [the decedent] continued to live in the residence until his death is sufficient basis to include it in his taxable estate."[30] The surviving widow testified that she and her husband both intended to live together after the property transfer, but that there was no formal agreement or discussion. On submission to a jury, the question of whether there was an implied agreement was answered negatively. The Sixth Circuit Court of Appeals affirmed the judgment for the taxpayer, noting Tennessee law providing for married women's separate property [31] and the state descent and distribution statutes[32] which, in this instance, prevented the husband from inheriting from the wife. The court made no attempt to define "possession or enjoyment," but intimated that the right of the husband to remain in the home was more in the nature of "a natural incident of the marital relationship"[33] rather than a retained benefit from the transfer. The opinion states that a more certain expression of congressional intent is necessary before such a transfer between husband and wife could be taxable. However, in his concurring opinion, Judge Edwards gave a sober warning: "The plain trend of the federal estate tax statute is toward elimination of exceptions such as this."[34] But, pending an adverse ruling from the Supreme Court, the intra-spousal transfer of a

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[27]Commissioner v. Estate of Holmes, 326 U.S. 480, 486 (1946).

[28]60 MICH. L. REV. 660, 661 (1962).

[29]361 F.2d 662 (6th Cir. 1966).

[30]*Id.* at 664.

[31]TENN. CODE ANN. § 36-601 (1956).

[32]TENN. CODE ANN. § 31-101 (1956).

[33]Union Planters Nat'l Bank v. United States, 361 F.2d 662, 666 (6th Cir. 1966).

[34]*Id.* at 667.

valuable family home is apparently still a safe method of reducing the taxable estate.

The *Union Planters* case stemmed from a fact situation similar to that considered by a Virginia federal district court which held that where a husband had given the house to his wife, the mere fact of continued residence therein by the husband was not sufficient evidence from which to infer a prearrangement which would have been, in effect, a retention of interest.[35] A Georgia federal jury determined that at the time a mother at her own expense built a home for her son, there was an implied agreement that she would live in the home for the rest of her life.[36] The transfer was brought within the purview of section 2036(a).

In *Estate of McNichol v. Commissioner*[37] the subject was income-producing real property. Decedent McNichol during his lifetime had executed general warranty deeds transferring the property to his children. No interest in the property was reserved according to the deeds, but the court found a contemporaneous oral agreement between McNichol and his children whereby he was to receive the income from the property until his death. The property was taxed. The court stated in the *McNichol* opinion that property would be taxed where the decedent had the right to the income but did not actually receive it or, alternatively, where he did actually receive the income but without a right enforceable under state law.[38] The court expressed no opinion in regard to a fact situation where the decedent might receive rents after the transfer but with no evidence of a prearranged agreement. Note the government's insistence upon abolishing the prearrangement test used in the *Union Planters* case.[39]

IV. Discretionary Trusts

In *Skinner v. United States*[40] the decedent-settlor of an inter vivos discretionary trust was held to have retained such enjoyment of the corpus as to render it includible. The case is important for its determination that where an independent trustee has sole discretion as to whether to distribute any income at all to the settlor for her "comfortable support and maintenance," [41] it is likely to cause the corpus to be includible in the decedent's estate. In addition, *Skinner* goes far

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[35]Stephenson v. United States, 238 F. Supp. 660 (W.D. Va. 1965).
[36]Peck v. United States, 65-2 CCH U.S. Tax Ct. 97,145 (1965).
[37]265 F.2d 667 (3d Cir. 1959).
[38]*Id.* at 671.
[39]361 F.2d 662 (6th Cir. 1966).
[40]316 F.2d 517 (3d Cir. 1963).
[41]*Id.* at 519.

in allowing the court to establish inferences as to a prearranged agreement with the supposedly independent trustee. Direct proof of prearrangement was not required by the trial court as was required in *Union Planters.* An earlier case from the Seventh Circuit had held property unincludible where an independent trustee had sole discretion in distributing income.[42] In *Commissioner v. Irving Trust Co.*[43] the Second Circuit Court of Appeals said that the right to designate the person to enjoy the property does not render the property includible if such power is held solely by a person other than the decedent.

Where a man created a trust, income to be paid to his wife for life, remainder over to their children, a provision in the trust allowing his wife to appoint the income to him for his life by her will did not include the transfer in the husband's estate as a retention of income.[44] The district court relied upon the lack of proof of any agreement between husband and wife that the wife would in fact appoint the income to him.

A particular danger of inclusion exists where the trustee is required to pay income to the settlor by such standards as "happiness,"[45] "best interests,"[46] or if "the circumstances so require."[47] Such standards are unascertainable by any external factor and may well cause inclusion as a retained right to income or corpus of a discretionary trust.

Where the settlor-trustee was empowered to distribute corpus to the beneficiaries in the event of "sickness or other emergency"[48] the Tax Court would not include the corpus in the decendent's gross estate, saying: "It is obvious that the power in question gave the trustee no absolute and arbitrary control over the corpus. On the contrary, it was conditional and limited. A definite standard—the sickness or other emergency" of the respective beneficiaries—was provided to govern its exercise."[49] However, noted writers on the subject indicate that the corpus should be taxable if the decedent had the power in the event of any contingency to demand income from the trustee.[50]

In any event, considering the trend of the decisions toward includibility, it would be dangerous to assume that a presently drafted discretionary trust allowing the settlor contingent rights to income would

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[42]*In re* Estate of Uhl, 241 F.2d 867 (7th Cir. 1957).

[43]147 F.2d 946 (2d Cir. 1945).

[44]Burrill v. Shaughnessy, 71 F. Supp. 99 (N.D.N.Y. 1947).

[45]Estate of Carolyn Peck Boardman, 20 T.C. 871 (1953).

[46]Estate of Cyrus C. Yawkey, 12 T.C. 1164, 1170 (1949).

[47]Hurd v. Commissioner, 160 F.2d 610 (1st Cir. 1947).

[48]Estate of Milton J. Budlong, 7 T.C. 756 (1946).

[49]*Id.* at 761.

[50]See LOWNDES & KRAEMER, FEDERAL ESTATE AND GIFT TAXES 144 (2d ed. 1962).

escape taxation in the transferor's estate. Such a power may be analogized to the secondary life estate, which, if anything, is a contingent interest, and yet is includible even though the transferor predeceases the holder of the primary life estate.[51]

V. Legal Obligations of the Transferor

Includibility of trust property in the estate of the decedent, the income of which is used to discharge a legal obligation of the decedent, is analogous to its includibility for income tax purposes as provided by the income tax law.[52] The property will be included under section 2036 if the income is used to satisfy such legal obligations, just as under income tax law such income would be taxed to the settlor. A legal obligation is defined by local rather than federal law.[53] Thus, trusts for the support of children[54] or wives [55] are likely to be includible.

Mississippi law provides that relatives are obligated to "relieve and maintain" a "pauper not able to work."[56] It would hardly be expected that the wording or construction of that statute would ever be urged by the Commissioner in a case involving section 2036. However, the decision reached by the Mississippi Supreme Court in *Pass v. Pass*[57] extends the obligation of support of minor children, in many instances, to providing for a college education. The court said, "We hold that where the minor child is worthy of and qualified for a college education and shows an aptitude therefor it is the primary duty of the father, in reason if financially able to do so, to provide funds. . . ."[58] The decision in *Pass* added Mississippi to the minority of states recognizing that a college education is part of the duty of parental support.[59]

Considering that many trust instruments provide for financing a child's higher education, there appears to be a likely possibility of an attempt to include the corpus of such a trust in the taxable estate. The courts may at least require the inclusion of that portion corresponding to the amount of income so distributed for education if the transferor dies prior to emancipation of the child.

In regard to legal obligations other than that of support, there is authority that the corpus will be includible only if the income is used

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[51]Treas. Reg. § 20.2036-1(b)(ii) (1958).
[52]*E.g.*, Int. Rev. Code of 1954, § 677(a).
[53]Treas. Reg. § 1.662(a)-4 (1956).
[54]National Bank of Commerce v. Henslee, 179 F. Supp. 346 (M.D. Tenn. 1959).
[55]Commissioner v. Dwight's Estate, 205 F.2d 298 (2d Cir. 1953).
[56]Miss. Code Ann. § 7357 (1956).
[57]238 Miss. 449, 118 So. 2d 769 (1960).
[58]*Id.* at 458, 118 So. 2d at 773.
[59]See Comment, 31 Miss. L.J. 285 (1960).

to discharge a primary liability of the decedent. For example, the Fifth Circuit Court of Appeals has held that where the decedent had, during lifetime, transferred mortgaged property to a trust, with the instrument directing that the mortgages were to be paid off from income from the property, there was no reservation of income by the grantor.[60] The reason assigned was that the trust became primarily liable for the debt and the transferor's protection against secondary liability as surety was too remote a possibility to be considered a retention of an income trust. It appears to be the rule that where the grantor has created a discretionary trust, with one of the potential beneficiaries being one whom the grantor is legally obligated to support, and with the trustee having sole discretion as to the application of the trust income, the trust property will not be taxable under section 2036.[61]

As in the *Dwight* case,[62] if it can be shown that only a portion of the trust income was necessary to fulfill the grantor's obligation to support the particular beneficiary, then only that corresponding portion of the corpus will be includible in the grantor's estate. The burden of proving that only a portion of the income was necessary for support is upon the decedent's estate.[63]

VI. Reciprocal Trusts

"Substance and not form is made the touchstone of taxability."[64] The Second Circuit Court of Appeals held in the celebrated case of *Lehman v. Commissioner*[65] that one who furnishes consideration for a trust created by another will be considered the grantor for the purpose of estate taxation. The deceased's estate was taxed on the amount of the trust corpus over which he had the power of invasion. In *Lehman* the court construed the forerunner of the present section 2038[66] which makes includible any trust over which the transferor had the power to alter, amend, or revoke.

The same court in a 1950 case[67] held that, where reciprocity was intended, the deceased beneficiary was in the same situation as if he had been the settlor of the trust created by his wife. The trust must be regarded as one in which he retained a life income. This decision

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[60]Hays' Estate v. Commissioner, 181 F.2d 169 (5th Cir. 1950).

[61]Colonial-American Nat'l Bank v. United States, 243 F.2d 312 (4th Cir. 1957).

[62]Commissioner v. Dwight's Estate, 205 F.2d 298 (2d Cir. 1953).

[63]Lowndes & Kraemer, Federal Estate and Gift Taxes 146 (2d ed. 1962).

[64]Estate of McNichol v. Commissioner, 265 F.2d 667, 673 (3d Cir. 1959).

[65]Lehman v. Commissioner, 109 F.2d 99 (2d Cir. 1940), *cert. denied*, 319 U.S. 637 (1940).

[66]Int. Rev. Code of 1954, § 2038.

[67]Orvis v. Higgins, 180 F.2d 537 (2d Cir. 1950).

was under the language of the present section 2036. It is apparent that the government will not allow trust property to escape taxation where there is evidence of any prearrangement between the parties indicating that one trust was consideration for the other.

VII. Gifts of Insurance Policies

If insurance policies are irrevocably transferred with no retention of incidents of ownership by the transferor, and the proceeds are not payable to his estate, it is fairly certain that the proceeds will not be includible in the transferor's estate.[68] At various times since the enactment of the estate tax law, the test for whether proceeds would be includible has been ownership of the policy, and at other times the test has been payment of the premiums. Under the 1939 Code, life insurance was taxed to the estate of the insured decedent if he had paid premiums, even though the proceeds were payable to beneficiaries other than the estate.[69] Under section 2042 of the 1954 Code, insurance proceeds are includible in the gross estate of the insured decedent only: (1) if such proceeds are payable to the executor or to benefit the estate; or, (2) if the decedent had at his death any incident of ownership in the policy, exercisable alone or in conjunction with another person.[70] Of course, these provisions, as in any of the "inter vivos gift sections," do not render safe a transfer made in contemplation of death.[71] Further, it is suggested that the criteria for includibility of insurance proceeds has not been made final.[72]

In the case of a funded insurance trust the question may be presented as to the taxability under section 2036 of the property used to fund the trust. It has been held that where the decedent-insured had created a funded insurance trust, retaining no interest or benefit from the policies, the value of the trust property used to create premium payments was not includible in the gross estate of the insured.[73]

The Second Circuit Court of Appeals has held that where a life estate in the proceeds of insurance is reserved by the settlor of a funded insurance trust, the corpus of the trust used to pay the premiums will be included along with the value of the insurance policies.[74] This result

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[68]Lowndes & Kraemer, Federal Estate and Gift Taxes 147 (2d ed. 1962).

[69]Int. Rev. Code of 1939, ch. 3, § 811(g), 53 Stat. 122.

[70]Int. Rev. Code of 1954, § 2042.

[71]Int. Rev. Code of 1954, § 2035.

[72]Trachtman, Estate Planning 89 (1965).

[73]Bennett v. United States, 185 F. Supp. 577 (N.D. Ill. 1960).

[74]Commissioner v. Estate of Arents, 297 F.2d 894 (2d Cir. 1962), *cert. denied*, 369 U.S. 848 (1962).

was based upon a fact situation in which the settlor transferred policies on the life of another, but predeceased the insured.

VIII. Reserved Powers

The foregoing portion of this paper has been concerned with the restrictions of section 2036(a)(1) on the retention of income, and possession or enjoyment. It should be noted that section 2036 actually provides for two kinds of taxation—one upon interest in property or income, and another tax on "the right either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom."[75] It is significant that 2036(a)(2) is operative even though the transferor has retained no beneficial enjoyment of the transferred property, but only retains discretion to designate who will have such enjoyment.[76]

Section 2036(a)(2) appears to closely parallel the "alter, amend, or revoke" provisions of section 2038. However, it is important to note that under 2036(a)(2) a different amount may be taxable than under 2038. Under section 2036(a)(2), a retained "right" necessary to cause the property to be taxed must have been retained at the time of the transfer. Section 2036 taxes the full amount of the property in which any right to designate enjoyment during the life of the transferor is retained (unless that right is relinquished at a time not ascertainable by reference to the transferor's death and not in contemplation of death). Under section 2038, only the value of the interest subject to the power to "alter, amend, or revoke" is taxable.[77] Since the Commissioner is often unsure himself as to which of the two statutes he may successfully invoke, he will usually attempt to show that both statutes apply.[78]

It is important to differentiate between powers limited by an ascertainable standard and those over which no limiting standard is placed. Where the grantor had power to invade trust property for the "best interests" of the beneficiaries, it was held that the power was not sufficiently restricted to limit the application of section 811(c) [2036(a)(2)].[79]

However, in *United States v. Powell*[80] the transferor, as co-trustee, retained a power to distribute principal for the "maintenance, welfare, comfort, or happiness" of the beneficiaries. In construing section 2038,

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[75]Int. Rev. Code of 1954, § 2036(a)(2).

[76]Industrial Trust Co. v. Commissioner, 165 F.2d 142 (1st Cir. 1947).

[77]For discussion and exceptions to the general rule see Lowndes & Kraemer, Federal Estate and Gift Taxes 188-90 (2d ed. 1962).

[78]*E.g.*, Estate of Robert W. Wier, 17 T.C. 409 (1951).

[79]Estate of Cyrus C. Yawkey, 12 T.C. 1164, 1170 (1949).

[80]307 F.2d 821 (10th Cir. 1962).

the court equated "happiness" with "welfare and comfort" to find an ascertainable, external standard.

Even though, as stated above, section 2036 taxes the entire value of the gift where there has been a retained right, an exception is made where the right is intended to be exercisable over only a portion of the income, and presumably, over only a portion of the corpus. In *Industrial Trust Co. v. Commissioner*,[81] it was decided that where the transferor had retained power to determine the disposition of all income in excess of 2500 dollars annually, that portion of the corpus necessary to produce 2500 dollars income was not includible. Had the income never exceeded 2500 dollars, none of the corpus would have been taxable. The Tax Court has held that where income is accumulated for the life of the transferor and distributed at his death, the corpus is taxable since the deceased could have, at any time during his life, changed his will, thereby changing the disposition of the income.[82]

The deceased transferor may have acted as trustee of the property without necessarily causing includibility if there had been such an ascertainable external standard of disposition that his sole discretion in distributing benefits would have been limited. In a case where the powers conferred upon the trustee were limited to the point that the decedent, as substituted trustee, could not have had the power to materially vary the enjoyment of benefits, the corpus was not includible in the deceased transferor-trustee's estate.[83] However, it would be well to study the broad rule promulgated by *State Street Trust Co. v. United States*[84] where the grantor was, until his death, a substantial co-trustee. Broad powers granted the trustees, in regard to investment and exchange of trust property, rendered the corpus includible under the statute. The court in *State Street* reasoned that the right to invest in wasting assets, saving the property for remaindermen, or to invest in high yield, but risky assets for the benefit of the life holder amounted to a discretionary power over the distribution of income. The trust instrument provided powers in the trustee similar to those granted trustees who may invest outside the legal lists.

Thus, the *State Street* case has applied the retained administrative powers covered by the *Clifford* income tax doctrine[85] to the construction of section 2036(a)(2). With the prospect of further application of the

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[81]165 F.2d 142 (1st Cir. 1947).

[82]Estate of D. I. Cooper, 7 T.C. 1236 (1946).

[83]Estate of Pierre Jay Wurts, 29 P-H Tax Ct. Mem. 610 (1960).

[84]263 F.2d 635 (1st Cir. 1959).

[85]Int. Rev. Code of 1954, §§ 671-78; see Helvering v. Clifford, 309 U.S. 331 (1940).

Clifford doctrine, one should note the extent of section 675(4)[86] of the income law tax which provides that a grantor is treated as the owner of a trust and may be taxed for its income if he retains, in a *non-fiduciary* capacity, "a power to vote or direct the voting of stock or other securities of a corporation in which the holdings of the grantor and the trust are significant from the viewpoint of voting control . . ."[87]

With *State Street* paving the way, it is conceivable that the Commissioner will attempt to invoke that rationale upon gifts in trust of stock in closely held corporations or upon partnership interests in family businesses.[88]

Where retained powers over the trust enabled the transferor to accumulate income, causing the corpus to be includible in the transferor's estate, the income so accumulated was also includible.[89] By so deciding, the Supreme Court overruled a decision of the Seventh Circuit Court of Appeals on the same point.[90] The Supreme Court reasoned that each accumulation was in substance a taxable transfer.

The Supreme Court's rule on accumulations was preceded by the First Circuit Court of Appeals' decision in *Round v. Commissioner*,[91] which decided that property acquired with income accumulated at the transferor's discretion would be includible along with any income accumulated as part of the principal.

X. Conclusion

Court decisions under section 2036 have, through the years, tended more toward inclusion of property in the taxable estates, with a few such notable exceptions as *May v. Heiner*. As Judge Edward's concurrence in *Union Planters*[92] indicates, congressional intent is present, though not always clearly expressed, to include property in the gross estate if it has been disposed of only by an essentially testamentary transfer. As a result, we may soon see the courts cast aside the necessity of proof of a prearranged agreement. The stage has been set in *Skinner v. United States*[93] where the court said that a judge may make such inferences as a

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[86] Int. Rev. Code of 1954, § 675(4).

[87] *Ibid.*

[88] See Pedrick, *State Street Trust Erred in Basing Estate Tax on Administrative Powers*, 13 J. Taxation 48 (1960); Stevens, *State Street Decision Makes Urgent Review of Powers of Settlor-Trustee*, 11 J. Taxation 172 (1959).

[89] United States v. O'Malley, 86 Sup. Ct. 1123 (1966).

[90] Commissioner v. Estate of McDermott, 222 F.2d 665 (7th Cir. 1955).

[91] 332 F.2d 590 (1st Cir. 1964).

[92] Union Planters Nat'l Bank v. United States, 361 F.2d 662 (6th Cir. 1966).

[93] 316 F.2d 517 (3d Cir. 1963).

matter of law. The *McNichol*[94] court declined comment on lack of proof of prearrangement, but said that if one did in fact receive benefits with no enforceable right to such benefits, the property would be included. This seems but a short step from the Commissioner's removal of the prearrangement proof obstacle.

When the prearrangement test is removed it appears both substance and form become the touchstones of taxability. Therefore, it would seem dangerous for the grantor to enjoy any benefit from transferred property unless he accepts the possibility of an inferred agreement as a matter of law, rendering the property taxable in his estate.

Nor should a trust instrument provide for the discretionary trustee to distribute benefits to the grantor in any contingency. Thought should be given also to the possibility of inclusion where such discretionary disposition may be made to one to whom the grantor is liable for support. Surely the secondary life estate, made taxable by the regulations, is no less contingent than the "ascertainable standards" used to govern dispositions in discretionary trusts.

Finally, a precaution now used in short-term trusts should be applied in regard to section 2036. If possible, the grantor should never be a trustee, or even likely to become one. The dangers here, where the trustee has power to buy and sell trust property, are pointed up in the *State Street*[95] decision. By a slight extension of *State Street,* one may note the potential danger of inclusion where the grantor has any administrative power affecting the gift property, even though he is not a fiduciary. Consider gifts of interests in a family business, whether incorporated or a partnership, where the granting head of the family holds control of the business and its resulting profits. Such transfers are rapidly coming closer to taxation under section 2036.

George Harold Noe

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[94]Estate of McNichol v. Commissioner, 265 F.2d 667 (3d Cir. 1959).

[95]State St. Trust Co. v. United States, 263 F.2d 635 (1st Cir. 1959).

USE AND INTRODUCTION OF EXACT SCIENCE BOOKS AND LEARNED TREATISES

I. Introduction

As many attorneys will readily admit, the practice of law is becoming more complex and more mutable as time progresses. A consequence of this fluidity is that attorneys are finding it difficult to stay abreast of the myriad, sweeping developments in the law. The purpose of this comment is to assist these attorneys by introducing or reintroducing them to an area of trial practice that the writer considers much neglected. This comment will be concerned, in the main, with the use and introduction of exact science books in the trial as a whole, learned treatises during direct examination of an expert witness, and learned treatises during cross-examination of an expert witness. As should be expected, there is some overlapping of these three major divisions, as exemplified by safety codes. A particular safety code may contain material on speed or stress limits (*i.e.*, mathematics tables) and a discourse or opinion on safety procedure (*i.e.*, a learned treatise).

The importance of this general topic is self-evident. In almost every personal injury or other tort action there exists the opportunity to use an expert witness, and each time an expert witness takes the stand there is a distinct possibility that a learned treatise might be used at some stage of that witness's testimony. Exact science books may also serve a useful purpose in a trial. In fact, the proper use of a book of exact science might preclude calling a costly expert witness. The scope of this comment will attempt to present the majority view, the minority view, and the Mississippi view concerning these three major divisions. It should be noted that a certain jurisdiction may vacillate between the different views. The uncertainty of a jurisdiction's viewpoint causes a pronounced difficulty in formulating a static, straightforward approach. Considering this uncertainty and the fact that the topic covers only a limited area in the vast field of evidence, a discussion and analysis of the decisions involving this topic should be the most advantageous tack.

The hearsay rule proscribes the use of an out-of-court statement that is introduced into evidence for the truth of the matter contained therein. Considering this basis for the exclusion, it becomes obvious that if an exact science book or learned treatise is to be admitted into evidence, it must be as an exception to the hearsay rule. Many reasons for invoking the hearsay rule as to these standard works have been given by the courts, but a few of them have appeared more often than others. Generally, the popular reasons are:[1] the author of the work is not

[1] 6 Wigmore, Evidence § 1690 (3d ed. 1940).

present for cross-examination; the sanction of the oath is lacking; scientific principles are subject to change and modification; and, the technical material may confuse or mislead the jury. Standard works, while not accepted as an exception to the hearsay rule in all jurisdictions, are slowly gaining wide recognition throughout the United States. Those jurisdictions which now admit the standard works into evidence rationalize their actions thusly:[2] the information in these works is based on certain and constant data and deals with the exact sciences; the works are not written with an eye for litigation; and they are a way of getting an unbiased opinion. After giving the general objections to and reasons for the admissibility of standard works, it is thought best to go into the specific types of works that come under this exception to the hearsay rule, though it should be noted that many courts get around the problem of the admissibility of standard works by resorting to judicial notice.[3]

II. Use and Introduction of Exact Science Books

A. Scientific Tables

Mortality or actuarial tables are generally admissible in most jurisdictions,[4] but in the admitting jurisdictions there is great divergence as to why they are admitted. Some jurisdictions allow the introduction of mortality tables to appraise the value of a future interest.[5] In wrongful death actions the tables may be used to prove the life expectancy of the deceased, and in this same type of action use has been made of them to determine the life expectancy of the surviving plaintiff so that an accurate measure of damages could be had.[6] Actuarial tables generally distinguish between male and female, but a government table which did not make such a distinction was held admissible to compute gift tax liability arising from the creation of a remainder interest.[7] In Mississippi the tables, although admissible, are not considered conclusive on the question of life expectancy, and are admitted merely as an aid to the jury.[8]

Mathematics tables belong to a class which are admitted as primary evidence because they are deemed to come from exact sciences or have been in use so long that they are accepted as "standard and unvarying

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[2] *Id.* at § 1692.

[3] 31A C.J.S. *Evidence* §§ 58, 74, 76, 99 (1964).

[4] See, *e.g.*, Avance v. Thompson, 387 Ill. 77, 55 N.E.2d 57 (1944).

[5] *E.g.*, Commissioner v. Maresi, 156 F.2d 929 (2d Cir. 1946).

[6] *E.g.*, Giles v. Chicago, Great W. Ry., 72 F. Supp. 493 (D. Minn. 1947).

[7] McMurtry v. Commissioner, 203 F.2d 659 (1st Cir. 1953).

[8] Tucker v. Gurley, 179 Miss. 412, 176 So. 279 (1937).

authority."[9] Included in this category are manufacturers' tables that show the performance of their merchandise, such as a table showing the power of a set of brakes.[10] A Louisiana case[11] allowed into evidence a table which gave the stopping distances for an automobile at certain speeds but the court did say that the accuracy of the table should be established before it was admitted. An 1885 California case, while denying the admission of a medical book because medicine was not an exact science, stated that books of weights, measures, currency, and interest rates were admissible because they were of the classification of exact sciences founded upon conclusions reached from certain and constant data.[12] In an action in Washington to restrain the use of a fishing net, United States tide tables were admitted to determine the depth of the location of the net below low tide.[13]

Mississippi has long recognized this type of table. In *Tucker v. Donald*[14] the court refused to admit a medical book as primary evidence, but it did say this about standard works:

> There is a class of books which are admitted before the jury as primary evidence; but these are such as relate to sciences deemed exact, or such as by long use in the pratical affairs of life have come to be accepted as standard and unvarying authority in determining the action of those who use them. To the first class belong almanacs, astronomical calculations, tables of logarithms and the like, to the second [class belong] tables of life expectancy in matters of insurance.[15]

In a later Mississippi case involving the weight of a certain specie of log, the court, by way of dictum, said that commonly recognized and customarily used books or tables might be considered and that by following this procedure the jury would have the most dependable method of arriving at the weight.[16] From the foregoing cases and secondary authorities,[17] an opinion can be formed that mathematics tables are generally admitted into evidence in the majority of jurisdictions, including Mississippi, as coming within the category of the exact sciences.

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[9]Tucker v. Donald, 60 Miss. 460, 470 (1882).

[10]Lynes v. Northern Pac. Ry., 43 Mo. 317, 117 Pac. 81 (1911).

[11]Gaines v. Standard Acc. Ins. Co., 32 So. 2d 633 (La. App. 1947).

[12]Gallagher v. Market St. Ry., 67 Cal. 13, 6 Pac. 869 (1885).

[13]Cherry Point Fish Co. v. Nelson, 25 Wash. 558, 66 Pac. 55 (1901).

[14]60 Miss. 460 (1882).

[15]*Id.* at 470.

[16]Harris v. Pounds, 185 Miss. 688, 187 So. 891 (1939).

[17]See, *e.g.*, 2 WHARTON, CRIMINAL EVIDENCE § 567 (12th ed. 1955).

B. Safety Codes

The majority rule as to the admissibility of safety codes issued by governmental agencies is that if the codes do not have the force of law, they are not admissible into evidence. Safety codes promulgated by voluntary associations, such as the National Safety Council, seem to enjoy a more favored position with the courts since they are generally admitted into evidence when the governmental safety code would be refused.[18]

When safety codes are denied admission, the courts' reasoning usually follows two lines: (1) safety codes do not belong to the category of exceptions, such as mortality tables, and weights and measurements, because safety is, at best, an inexact science;[19] and, (2) since safety codes do not have the force of law, they cannot be admitted as absolute evidence of a standard of care.[20]

The trial court in the case of *Manhat v. United States*[21] did not allow the plaintiff to introduce into evidence a Coast Guard publication concerning the safety procedure for securing a lifeboat. The court of appeals upheld this ruling by holding that the publication did not contain authoritative requirements or regulations on securing a lifeboat. The court further reasoned that the contents of the publication were not required to be published in the Federal Register and that the manual was no more than a quiz book for those taking examinations for certificates as lifeboatmen. The reasons just given were for not admitting the manual, so conversely, if some or all of these elements were present, one might get the manual admitted.

A Tennessee court,[22] in denying use of instructions to be given children on how to walk safely on the highway, said that such safety regulations, which were not law and were not promulgated by anyone authorized by law, were inadmissible.

The general rule denying the admission of safety regulations is subject to a minority view which advocates admission. While some of the jurisdictions following the minority view either admit the regulations into evidence or allow the court or a witness to refer to them, Alabama has taken the most definite stand for admissibility. In the case of *City of Dothan v. Hardy*,[23] the court admitted, as expert opinion evidence,

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[18]See Annot., 75 A.L.R.2d 778 (1961).

[19]*E.g.*, Mississippi Power & Light Co. v. Whitescarver, 68 F.2d 928 (5th Cir. 1934).

[20]*E.g.*, Wright v. Des Moines Ry., 231 Iowa 410, 1 N.W.2d 259 (1941).

[21]220 F.2d 143 (2d Cir. 1955).

[22]Long v. Tomlin, 22 Tenn. 607, 125 S.W.2d 171, 180 (1938).

[23]237 Ala. 603, 188 So. 264 (1939).

safety regulations promulgated by the Bureau of Standards. The court defended its holding thusly:

> To our thinking there are stronger reasons for admitting the rules promulgated in this way than for admitting the ordinary treatise on evidence that is a standard authority. A government bureau is set up with full authority to make full inquiry, to acquire information from all and every source, including the practical experience of those engaged in the particular line of business everywhere, to make an official finding of the standards proper to be observed, and to make an official publication thereof as information to the public.[24]

The court explained further that the fact that the government agency received scrutiny and criticism from other parties involved in that field made their finding a strong form of evidence.

The Court of Appeals for the Fifth Circuit held a safety regulation (National Electric Safety Code) properly excluded in the lower court (a federal district court in Mississippi).[25] The court reasoned that the code was not required by law; it merely represented the opinion of its compilers; the matter contained therein was subject to many conflicting views; and, it did not deal with an exact science. The court drew an analogy between codes of this type and medical treatises and presented the common objections (*e.g.*, no cross-examination; author's opinion subject to change; and, not written or delivered under oath). The decision in this case cited the Mississippi case of *Tucker v. Donald*[26] and would seem to place Mississippi in agreement with the majority of jurisdictions as concerns safety codes.

C. Almanacs

Almanacs, at least the part of them that deals with the exact sciences, are generally admissible into evidence.[27] In a Maryland case[28] the state supreme court upheld the lower court's ruling that an almanac was admissible to show what time the moon rose on a certain night. The court said: "We govern our daily life by reference to the computations which [the almanacs] contain."[29] In this decision *Sisson v. Cleveland & T. R.R.*[30] was quoted as saying, "[C]ourts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of

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[24]*Id.*, 188 So. at 267.

[25]Mississippi Power & Light Co. v. Whitescaver, 68 F.2d 928 (5th Cir. 1934).

[26]60 Miss. 460 (1882).

[27]See 2 WHARTON, *supra* note 17 § 567.

[28]Munshower v. State, 55 Md. 11 (1880).

[29]*Id.* at 24.

[30]14 Mich. 489 (1866).

information which the rest of the world relies on, and demand evidence of a less certain and satisfactory character."[31]

Mississippi seems to recognize that almanacs are admissible as evidence. In the case of *Tucker v. Donald*[32] the court apparently answered the problem in this jurisdiction by holding that certain books which relate to the exact sciences are admissible as primary evidence. Among the books mentioned by the court which would fall into this class were almanacs.

D. Dictionaries

Professor Wigmore[33] states that dictionaries may be used, within narrow limits, when the definition of a word is important in the trial of a case. In the case of *Nix v. Hedden*[34] the issue evolved as to whether tomatoes were fruits or vegetables. The court said this was a point on which it could take judicial notice, and that on such a question dictionaries could be admitted, not as evidence, but only as an aid to the memory and understanding of the court. In an action[35] in which the definition of the word "vaccine" was determinative of whether an importer would have to pay duty, the importer used a dictionary as evidence of a definition favoring his position. The court was not convinced by this authority, reasoning that the major dictionaries did not define vaccine in the same way. The court in *Kimball v. Carter*,[36] in determining on appeal if the lower court had correctly defined "inclosed lands," resorted to several dictionaries. It should be noted that the dictionaries were not actually introduced into evidence, but that the court did use them in making its final determination.

While there seems to be no Mississippi case in which use of a dictionary has been made, the Mississippi courts tend to solve this problem by judicially noticing the meaning of certain words.[37]

E. Encyclopedias and Historical Works

Although it is not the generally accepted rule, various courts have admitted encyclopedias and historical works into evidence to prove a historical point, but generally the courts will avoid admitting either of

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[31] *Id.* at 497.

[32] 60 Miss. 460 (1882).

[33] 6 WIGMORE, *supra* note 1 § 1699.

[34] 149 U.S. 304 (1893).

[35] Koechl v. United States, 84 Fed. 448 (2d Cir. 1898).

[36] 95 Va. 77, 27 S.E. 823 (1897).

[37] See Rodgers v. Kline, 56 Miss. 808 (1879).

the two by taking judicial notice of the fact sought to be proved.[38] The Mississippi courts seem to follow this procedure.[39]

F. Statutory Use and Introduction

A number of states have elected to take the admission or exclusion of standard works out of the courts' bailiwick by the enactment of statutes which admit these materials under certain circumstances. The states of California,[40] Idaho,[41] Montana,[42] and Utah[43] each have enacted identical statutes. The statute reads: "Historical works, books of science or art, and published maps or charts, when made by persons indifferent between the parties, are prima facie evidence of facts of general notoriety and interest." The states of Iowa[44] and Nebraska[45] have almost the same statute, except that their statutes use the words "presumptive evidence" in lieu of "prima facie evidence." It would seem that the states which have enacted such a statute have acted wisely, because the statute then controls the admissibility of the materials, thereby preventing the quagmire into which the courts of the non-statute states have gotten themselves. It should be noted that the statute above would seem to pertain to both exact science books and learned treatises.

III. Use and Introduction of Learned Treatises During Direct Examination of An Expert Witness

A. General Rule of Inadmissibility

As a general rule books of science and learned treatises are not admissible as proof of the facts stated therein.[46] Books classified as being about an exact science constitute an exception to this rule. The following cases illustrate how the general rule of inadmissibility is applied in the different jurisdictions to various types of cases.

That learned treatises were inadmissible during direct examination at common law is shown by a Texas murder case styled *Burt v. State*,[47] decided in 1897. To help prove the defense of insanity, counsel for the defendant had attempted to introduce excerpts from a medical authority.

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[38]See 6 Wigmore, *supra* note 1 § 1699.
[39]See Miller v. Fowler, 200 Miss. 776, 28 So. 2d 837 (1947).
[40]Cal. Civ. Proc. § 1936 (1955).
[41]Idaho Code Ann. § 9-402 (1948).
[42]Mont. Rev. Codes Ann. § 93-1101-8 (1964).
[43]Utah Code Ann. § 78-25-6 (1953).
[44]Iowa Code Ann. § 622.23 (1950).
[45]Neb. Rev. Stat. § 25-1218 (1956).
[46]See 20 Am. Jur. *Evidence* § 797 (1939).
[47]38 Tex. 397, 40 S.W. 1000 (1897).

The court, noting that there was no state statute allowing admission, said that the common law rule would be followed and that this rule dictated that the treatise be excluded.

In another case, a manufacturer's tests conducted on its air brakes were held inadmissible in a wrongful death action.[48] The court, in holding the lower court's admission error, said that the tests were nothing more than advertisements. In a 1909 Iowa personal injury action[49] the plaintiff had been injured while walking on a temporary sidewalk constructed by the defendant city. Plaintiff's counsel put on a medical expert, and during the examination counsel read extracts from a medical treatise. The court, on appeal, reversed the decision with an unequivocal statement that it was error to admit medical works into evidence.

More recent cases still follow the general rule of nonadmissibility. In a murder trial in Arkansas,[50] tried in 1931, the defendant's counsel attempted, on direct examination of his expert witness, to introduce into evidence certain parts of a medical treatise. The trial court refused to admit the treatise and upon conviction, the defendant appealed on this point. The supreme court, in affirming the conviction, held that the extracts from the medical treatise were not competent evidence. The court reasoned the correct rule to be that an attorney could use a medical book to aid him in framing questions to be asked of a physican testifying as an expert, but that it was not permissible to read from such books to the jury.

In the case of *Salgo v. Stanford Univ. Bd. of Trustees*[51] the plaintiff sued for injuries caused by the university's doctor. During the trial the plaintiff's attorney got a drug manufacturer's brochure admitted. The brochure was to be used to show what dosage of a certain drug was considered safe. The court, on appeal, reasoned that the present case law of California would not permit the introduction of medical books or brochures on direct examination.

A New York hair dye manufacturer was sued for injuries sustained from the use of his product.[52] The plaintiff presented an expert witness to prove that the defendant's instructions on the use of the dye were inadequate. In addition to the expert's testimony, counsel for the plaintiff read to the jury from a medical book on which the expert had based his opinion. This was held by the reviewing court to be error

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[48]Illinois Cent. R.R. v. Stith's Adm'x, 120 Ky. 237, 85 S.W. 1173 (1905).

[49]Etzkorn v. City of Oelwein, 142 Iowa 288, 120 N.W. 636 (1909).

[50]Moore v. State, 184 Ark. 682, 43 S.W.2d 228 (1931).

[51]154 Cal. App. 2d 560, 317 P.2d 170, 182 (Dist. Ct. App. 1957).

[52]Phillips v. Roux Lab. Inc., 286 App. Div. 549, 145 N.Y.S.2d 449 (1955).

because of the danger of the treatise's replacing the expert's testimony as primary evidence.

In a federal action[53] to restrain violation of the Federal Food, Drug, and Cosmetic Act, the defendant offered certain medical books into evidence. Upholding the exclusion of the evidence the court stated: "It is the rule in this circuit, as in practically all of the states, that medical books are not competent as evidence."[54]

Mississippi has long adhered to the rule of inadmissibility of learned treatises. In the case of *Tucker v. Donald*[55] the question arose as to the effect of paralysis on the human arm. An expert witness was put on the stand and during direct examination counsel attempted to read into evidence extracts from a medical dictionary. The supreme court assumed that counsel was trying to introduce the dictionary as primary evidence. The court averred that by the great weight of authority the dictionary was clearly inadmissible. In a later case,[56] tried before a federal court in Mississippi, the National Electric Safety Code was held inadmissible. The power company defendant put an expert on the stand and attempted to introduce the code as evidence. The trial court's refusal to admit the code as primary evidence was upheld on appeal. The reviewing court reasoned that the code was inadmissible because it did not purport to represent an exact science. The holding of *Tucker* is still in effect in Mississippi and has been cited numerous times. This, along with the fact that the state has no statutory exception, would put Mississippi clearly in agreement with the majority of jurisdictions.

B. Reasons for the General Rule

The jurisdictions which follow the general rule and refuse to admit the treatises on direct examination usually give as their reasons, one or a combination of the following: there is no cross-examination;[57] there is no oath;[58] scientific principles are extremely mutable;[59] the jury may be perplexed by the technical material;[60] the learned treatises are not on an exact science;[61] and, the treatises are hearsay evidence.[62]

The plaintiff in *Edwards v. Union Buffalo Mills Co.*[63] brought an

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[53]United States v. Paddock, 68 F. Supp. 407 (W.D. Mo. 1946).

[54]*Id.* at 409.

[55]60 Miss. 460 (1882).

[56]Mississippi Power & Light Co. v. Whitescarver, 68 F.2d 928 (5th Cir. 1934).

[57]*E.g.*, Landro v. Great No. Ry., 117 Minn. 306, 135 N.W. 991 (1912).

[58]*Ibid.*

[59]*E.g.*, Johnson v. Richmond & D. R.R., 95 Ga. 685, 22 S.E. 694 (1895).

[60]*E.g.*, People v. Hall, 48 Mich. 482, 12 N.W. 665 (1882).

[61]See, *e.g.*, Gallagher v. Market St. Ry., 67 Cal. 13, 6 Pac. 869 (1885).

[62]Bowles v. Bourdon, 148 Tex. 1, 219 S.W.2d 779 (1949).

[63]162 S.C. 17, 159 S.E. 818 (1931).

action for personal injuries sustained while in the employ of the defendant. Counsel for the plaintiff, in examining his expert witness, read to the jury pertinent sections of a medical treatise. The defendant assigned this as error, and on appeal the court reversed the decision on the grounds that the reading of the treatise into evidence violated the right of cross-examination and constituted hearsay. It is interesting to note that this was a South Carolina case—one of the jurisdictions which has a statutory exception for cases involving insanity or poisoning—and that the admission was denied because this case did not fall within the statute.

In a Texas malpractice action[64] the plaintiff's counsel read from a medical treatise during direct examination of his expert witness and also on cross-examination of the defendant's expert witness. The supreme court allowed the use on cross-examination solely to discredit the expert, but refused to uphold the use of the treatise on direct examination.

The court in *Tucker* quieted any doubt about the admissibility in Mississippi by saying, "However high, therefore, may be the general character of the work, it lacks every safeguard which distinguishes hearsay from legal evidence, and stands, therefore, upon a far inferior and wholly different footing from the testimony of the humblest expert."[65]

C. Exceptions to and Equivocations on the General Rule

Despite the abundance of authority supporting the general rule, some jurisdictions and some legal scholars advocate the admission of learned treatises on direct examination. Wigmore[66] advocates a more liberal rule as to admissibility. The Uniform Rules of Evidence[67] also advocate the admission of treatises as substantive evidence, if used in conjunction with an expert witness.

The general rule that learned treatises cannot be introduced into evidence on direct examination is not followed in all jurisdictions. A discussion of this minority view will be given in an attempt to elucidate this apparent incertitude.

The defendant, in an action on a fire insurance policy,[68] contended error in that plaintiff's witness was allowed to read excerpts from a learned treatise while giving his testimony. The court on appeal held that it was not error to allow an expert witness to read from a learned treatise to support his professional opinion. A possible explanation for this decision is that the books read from contained results of mechanical

[64]Bowles v. Bourdon, 148 Tex. 1, 219 S.W.2d 779 (1949).

[65]Tucker v. Donald, 60 Miss. 460, 470 (1882).

[66]6 Wigmore, Evidence § 1962 (3d ed. 1940).

[67]Uniform Rules of Evidence 63 (31).

[68]Western Assur. Co. v. Mohlman, 83 Fed. 811 (2d Cir. 1897).

experiments and tabulations as to breaking strengths, so that the subject matter closely resembled that of an exact science.

In a wrongful death action styled *Scott v. Astoria R.R.*,[69] the plaintiff used an expert witness to prove negligence on the part of the defendant railroad in constructing its rails too near a hillside. The expert, during direct examination, was permitted to give an opinion and then to state several learned treatises that coincided with his opinion. The Supreme Court of Oregon, after a lengthy discussion of the inadmissibility of permitting experts to testify as to statements contained in medical treatises, held that the expert could corroborate his testimony by citing authorities which agreed with him. The court recognized the danger inherent in allowing this by stating:

> True, it may be possible that a pretended expert may give an opinion upon a material fact, and fortify it by referring to the work of some fictitious author upon the subject; and, the adverse party being unable to secure the book mentioned, the reference of the witness might add to his false testimony a weight to which it was not entitled.[70]

Again, as in the previous case, it can be argued that this result would not have transpired had the subject matter of the treatise been on medicine or on another inexact science. The subject in this case involved engineering with its inherent exactness, so this could have been in the court's mind when it ruled the testimony and subsequent corroboration admissible.

The plaintiff, in a 1912 Arkansas case,[71] sued his employer for the loss of his arm while operating the defendant's sawmill. During the direct examination of the plaintiff's expert medical witness, the witness was allowed, in giving his opinion, to refer to several medical authorities. The court on appeal reasoned that the treatises were not introduced as original or affirmative evidence and that no error was committed in allowing the expert to cite them. Due to the nebulous language of the decision, it is difficult to say with certainty that the court intended to hold that an expert witness could substantiate his testimony by referring to authorities that agreed with him.

In equivocal language, a Texas case[72] held that it was not reversible error to allow expert medical witnesses to read from medical books certain passages that corroborated their testimony. The court supported its opinion by quoting *American Jurisprudence,* which said:

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[69]43 Ore. 26, 72 Pac. 594 (1903).

[70]*Id.*, 72 Pac. at 6000.

[71]Fidelity & Gas. Co. v. Meyer, 106 Ark. 91, 152 S.W. 995 (1912).

[72]Coastal Coaches, Inc. v. Ball, 234 S.W.2d 474 (Tex. Civ. App. 1950).

> The opinions of expert witnesses must be founded in some degree upon such books; in fact they may as a general rule in support of their professional opinions, read in evidence from standard scientific works which are recognized as such by the profession in which they are engaged.[73]

A perusal of the cases in point indicates that allowing the expert to corroborate his testimony by reading to the jury from learned treatises is not the general rule as stated by this legal encyclopedia, but is merely a minority view.

An anomalous result was reached by a recent Maine case[74] which held that although medical treatises were hearsay and not generally admissible, they could nevertheless be admitted by consent.

Several states have seen fit to enact statutes which provide that the treatises may be admitted for limited purposes. South Carolina[75] allows their use on any issue involving poisoning or insanity, while Nevada[76] and Massachusetts[77] authorize their use only in a malpractice action. Of the jurisdictions which make exceptions to the general rule of inadmissibility (both statutory and nonstatutory), it would appear that Alabama is by far the most liberal. Alabama, although it does not have a statutory exception, allows learned treatises to be used on direct examination as substantive evidence.[78]

IV. Use and Introduction of Learned Treatises During Cross-Examination of An Expert Witness

A. General Rule

While some jurisdictions adhere to the rule of inadmissibility on cross-examination, it can be said that generally most jurisdictions are more liberal in allowing the use or introduction of learned treatises on cross-examination than they are on direct examination.[79] A federal circuit court, in 1916, expressed it thusly:

> With reference to reading from medical textbooks on cross-examination, it is true that the courts have held . . . that counsel cannot, in their own case, and as a direct part thereof, thus read; but with reference to the cross-examination of medical

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[73]20 Am. Jur. *Evidence* § 966 (1939).

[74]Goldthwaite v. Sheraton Restaurant, 154 Me. 214, 145 A.2d 362 (1958).

[75]S.C. Code Ann. § 26-142 (1962).

[76]Nev. Rev. Stat. § 51-040 (1965).

[77]Mass. Ann. Laws ch. 233, § 79c (1956).

[78]See, *e.g.*, Stoudenmeier v. Williamson, 29 Ala. 558 (1857).

[79]*E.g.*, Atlanta Corp. v. Olesen, 124 F. Supp. 482 (S.D. Cal. 1954).

> witnesses, very great latitude is necessarily allowed for indubitable reasons.[80]

The allowance of cross-examination, assisted by learned treatises, is generally held to be necessary as a safeguard against unscrupulous experts. The trial court in the case of *Clark v. Commonwealth*[81] refused to allow the use of a learned treatise in the cross-examination of an expert witness. The court on appeal held this error by declaiming:

> [W]e think such must be the sound view; otherwise, an ignoramus in a profession might, by an assertion of learning, declare the most absurd theories to be the teachings of the science of which he was a professed expert, and, when pressed on cross-examination as to either his own experience or the basis of his learning, would be enabled to hide behind the formidable name of some standard author, and thus foist upon the jury a most hurtful falsehood as a scientific deduction, asserted by the most eminent in the profession, solemnly declared and promulgated by him for the guidance of his brethren and the service of mankind.[82]

The United States Supreme Court has recognized the need for allowing the cross-examiner to use learned treatises. In the case of *Reilly v. Pinkus*,[83] a unanimous Court concluded that it was "unfair" to allow an expert witness to base his opinion on knowledge gathered from books and treatises and then to deny the cross-examiner the opportunity to challenge such evidence by questioning the expert on contrary opinions in other reputable materials.

Recent cases seem to be adopting a more liberal view toward the use of a treatise on cross-examination.[84] A 1965 Mississippi case styled *City of Laurel v. Upton*,[85] involved the question of whether the cross-examiner could use and introduce into evidence a short report written by the expert witness' medical associate which the expert had used and considered in forming his opinion expressed on direct. The lower court refused to allow this, but the supreme court on appeal said: "We do hold that appellant had the right to cross-examine [the expert] witness relative to any matters [*i.e.*, the report] which he used and considered in reaching his findings and to introduce such matters into evidence if [he] so desired."[86] This decision would seem to link

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[80]Victor Am. Fuel Co. v. Tomljanovich, 232 Fed. 622, 668-69 (1st Cir. 1916).

[81]111 Ky. 443, 63 S.W. 740 (1901).

[82]*Id.*, 63 S.W., at 744.

[83]338 U.S. 269 (1949).

[84]See *e.g.*, Lawrence v. Nutter, 203 F.2d 540 (4th Cir. 1953).

[85]175 So. 2d 621 (Miss. 1965).

[86]*Id.* at 625.

Mississippi with the general trend toward more liberal use of learned treatises on cross-examination. The general trend toward more liberal admissibility will be prevented from being abused by the almost nationally accepted rule that the use, admission, or exclusion of the learned treatise is at the sound discretion of the trial court.[87]

B. When the Treatises are Admissible

Although a more liberal view of admissibility is emerging, there seems to be uncertainty among the jurisdictions as to *when* the treatises will be admitted. A jurisdiction may admit the treatises only when the expert (1) relies on, (2) cites, or (3) acknowledges its authority. However, jurisdictions have been known to vacillate between the three categories, sometimes requiring (1), (2), or (3) and occasionally requiring that all three be present.[88] The categories as to when the treatises will be admitted can be generally enumerated as follows.

(1) When the Expert Relies on or Cites the Treatise

In some jurisdictions, generally classified as leaning toward the strict view of admissibility, if the expert during direct or cross-examination either relies on or cites the treatise as authority for his opinon, the cross-examiner will be allowed to use or introduce the same treatise to better effect his cross-examination.

A veterinary expert was used by the plaintiff in the case of *Pinney v. Cahill*.[89] On cross-examination the expert stated that all the major authorities agreed with his opinion and he cited several of them. The Supreme Court of Michigan, in upholding the trial court's allowance of the use of one of the cited treatises on cross-examination, resolved that under the circumstances it was not improper to resort to the book on cross-examination, not to prove the facts it contained, but to disprove the statement of the witness, and enable the jury to see that the book did not express what the expert had ascribed to it.

A New Jersey case[90] also represents the strict view on admissibility. The court said that medical treatises were not admissible on direct examination as substantive proof, and that on cross-examination the treatises were received into evidence only if the expert had referred to it as a basis for his opinion.

An early Florida decision[91] determined that it was not error to

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[87]See, *e.g.*, Woelfle v. Connecticut Mut. Life Ins. Co., 103 F.2d 417 (8th Cir. 1939).

[88]See Annot., 60 A.L.R.2d 77 (1958).

[89]48 Mich. 548, 12 N.W. 862 (1882).

[90]State v. MacRorie, 86 N.J.L. 401, 92 Atl. 578 (Sup. Ct. 1914).

[91]Eggart v. State, 40 Fla. 527, 25 So. 144 (1898).

use a treatise on cross-examination. The court concluded that specified books may be introduced in rebuttal to contradict an expert witness who has testified to having derived therefrom teachings which the books do not contain, or whose teachings are substantially different from the expert's testimony.

California was placed in this particular category by the case of *Gluckstein v. Lipsett*[92] which held that although the trial judge did not allow the treatise to be admitted on direct examination, he could allow it on cross-examination if the expert had based his opinion either generally or specifically on the medical work. The court commented that the jurisdictions were divided as to whether the treatises would be admitted when the expert did not use them to form his opinion, and that California did not permit the use of the treatise unless the expert had relied on or cited it as the basis of his opinion.

Representing the type of decision that makes it difficult to categorize a particular jurisdiction is a Texas case[93] decided in 1959. The court said that a treatise could not be used to cross-examine an expert witness unless he either had recognized such book as authoritative or had based his opinion in whole or in part thereon. Broadening its position further, the court stated that if an expert medical witness has specifically cited certain books or treatises as supporting his opinion, they could be used in cross-examining him by reading excerpts therefrom inconsistent with his testimony. Here the court followed the strict view of admissibility (*i.e.*, the expert must rely on the treatise as a basis for his opinion) and the more lenient view (*i.e.*, the treatise may be used if the expert merely recognizes it as an authority in the field).

The practice of allowing a treatise to be used to cross-examine an expert witness if he had relied on or cited it as authority was taken to an extreme in the federally tried case of *Garfield Memorial Hosp. v. Marshall.*[94] In this case the expert medical witness stated that he relied on "all" medical literature to form his opinion. The court held that since the expert had relied on all medical literature, the cross-examiner could then use all medical literature in questioning the witness.

Mississippi would seem to fall into the general category of allowing the use of the treatise on cross-examination if the expert has relied on or cited it. The decision in a recent case[95] advanced the rule in Mississippi that a cross-examiner may question an expert witness by using and

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[92]93 Cal. App. 2d 391, 209 P.2d 98 (Dist. Ct. App. 1949).

[93]Texas Employers' Ins. Assoc. v. Nixon, 328 S.W.2d 809 (Tex. Civ. App. 1959).

[94]204 F.2d 721 (D.C. Cir. 1953).

[95]City of Laurel v. Upton, 175 So. 2d 621 (Miss. 1965).

introducing any treatise that the expert has used and considered in forming his opinion.

(2) When the Expert Acknowledges or Recognizes the Treatise

In the second category, certain jurisdictions allow the use or introduction of a learned treatise on cross-examination when the expert witness either admits that he is familiar with the treatise or states that he recognizes it as an authority in the particular field. Again, a jurisdiction may use one or both of the reasons for allowing the treatise to be used.

During cross-examination, in a Missouri case,[96] the plaintiff's counsel asked the defendant's expert if he recognized a certain treatise as authoritative. Upon an affirmative answer by the expert, the cross-examiner was permitted to read extracts from the treatise. The state supreme court held this procedure not to be error and clarified its position by reasoning that the fact that the expert testified that he relied solely on his own experience did not preclude him from being subjected to cross-examination by reference to such writings.

In the Tennessee case of *Byers v. Nashville, C. & St. L. Ry.*[97] the plaintiff was suing the defendant railroad for wrongful death. During cross-examination the defendant's expert witness stated that he considered a particular treatise as an authority in the field. The cross-examiner was then permitted to use this treatise to form questions asked the expert. The reviewing court held this proper after stating the general proposition that matters of this nature are at the sound discretion of the trial court.

Representative of the jurisdictions which seem to require that the expert witness admit that he is both familiar with the treatise and recognizes it as an authority is Oregon,[98] The court explained this anomalous view by averring that when a medical expert, on cross-examination, is shown the works of a recognized authority and states that he is familiar with them and considers them standard authorities, there is no good reason why the expert should not be asked if he concurs in the opinion of the author.

Ruth v. Fenchel,[99] a New Jersey case decided in 1956, is in line with the jurisdictions discussed herein. The court in that case held that it was not error to allow an expert witness to be cross-examined with medical treatises when the expert had not relied on the treatise in forming his opinion, if he conceded the treatise used to be standard and authoritative. An extra restriction was added in this case in that the

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[96]Wurst v. American Car & Foundry Co., 103 S.W.2d 6 (Mo. App. 1937).

[97]94 Tenn. 345, 29 S.W. 128 (1895).

[98]Kern v. Pullen, 138 Ore. 222, 6 P.2d 224 (1931).

[99]21 N.J. 171, 121 A.2d 373 (1956).

court required that the jury be instructed that the treatise was not admitted for proof of the facts contained therein, but merely for the purpose of determining the expert's judgment and credibility.

Minnesota does not seem to agree with the foregoing cases in this section. In reversing the decision of the lower court in a personal injury action,[100] the supreme court of that state set forth its position that medical treatises are not admissible on direct examination of an expert. The court further held that treatises may be used on cross-examination if the expert has relied on them in forming his opinion; but if the expert only recognizes the treatise as authority and does not rely on it, error is committed by allowing the cross-examiner to use the treatise in his questioning.

From the decisions of the jurisdictions represented in this subtopic a generalization can be drawn. If a jurisdiction permits a treatise to be used on cross-examination when the expert recognizes it as an authority, it is likely that the same jurisdiction will indulge the use of a treatise when the expert has relied on or cited it as a basis for his opinion.

From a perusal of the latest case in Mississippi on this point,[101] it is submitted that this state has not quite reached the level of liberality evidenced by the jurisdictions previously discussed. To date, Mississippi allows the cross-examiner to question an expert witness about the contents of a particular treatise only if the expert witness has used and considered that treatise in forming his opinion.

(3) Liberal Jurisdictions

Another category in which several jurisdictions belong allows the cross-examiner to use standard, commonly recognized treatises in questioning an expert witness even though the expert does not rely on, cite, or acknowledge the treatise to be one of standard authority. Of the jurisdictions holding this position, by far the most liberal is Alabama. As stated above, Alabama seems to be the only nonstatutory jurisdiction which allows standard treatises to be introduced as substantive evidence.[102] This being true, Alabama finds no difficulty in permitting the treatise to be used or introduced on cross-examination.[103] It would seem that the jurisdictions which have a statute expressly providing that

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[100]Briggs v. Chicago, Great W. Ry., 238 Minn. 269, 494 57 N.W.2d 572, 983 (1953).

[101]See City of Laurel v. Upton, 175 So. 2d 621 (Miss. 1965).

[102]See, *e.g.*, Stoudenmeier v. Williamson, 29 Ala. 558 (1857).

[103]See, *e.g.*, Barfield v. South Highland Infirmary, 191 Ala. 553, 68 So. 30 (1915).

treatises may be used in certain type cases[104] would be liberal in allowing the cross-examiner to use such treatises.

In a federal case[105] appealed to the Eighth Circuit in 1929, the court allowed the expert witness to be cross-examined with treatises, but no prerequisite such as citing or relying on was required on the cross-examination. The court said that an expert could testify from the evidence whether in his opinion a certain installation was safe, and that opinion could be tested on cross-examination by reference to other authorities, and supported on redirect in the same way. The last phrase of the above sentence could be construed to mean that if the cross-examiner attacked the expert witness by using authorities, then on direct examination counsel could rehabilitate the expert by also using authorities.

In the Ohio case of *Bluebird Baking Co. v. McCarthy*[106] the court held that although the opinion of an expert witness must necessarily depend on his reading of authorities, he could not quote these authorities on direct examination. As to cross-examination, the court, without setting forth any restrictions as to when, averred that it was permissible in cross-examination of expert witnesses to interrogate the experts as to claimed distinctions between their testimony and that contained in publications by writers of recognized skill and ability.

Judgment was given to the plaintiff in a North Dakota case,[107] and one of the contended errors on appeal was that defendant's expert medical witness, on cross-examination, was asked if certain recognized authorities did not disagree with his opinion. The state supreme court upheld this practice and added that great latitude should be allowed in the cross-examination of an expert witness.

Washington seems to belong in this category. In a 1901 decision[108] involving a personal injury action, the defendant complained of the lower court's allowance of cross-examination by reference to authorities. Plaintiff's counsel asked a court-appointed expert if certain authorities did not offer a certain opinion; he then read from these authorities to the expert without asking the expert if he relied on, recognized, or was familiar with the authority. The reviewing court answered the defendant's assignment of error by holding that the rule of inadmissibility of treatises as substantive evidence was not announced to meet the situation where the treatises were used on cross-examination to test the knowledge of the expert. Making its position clearer, the court explained that the

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[104]See notes 75, 76, 77 *supra.*

[105]Yarn v. Fort Dodge, D.M. & S.R.R., 31 F.2d 717 (8th Cir. 1929).

[106]19 Ohio L. Abs. 466, 36 N.E.2d 801 (Ohio App. 1935).

[107]Kersten v. Great No. Ry., 28 N.D. 3, 147 N.W. 787 (1914).

[108]Clukey v. Seattle Elec. Co., 27 Wash. 70, 67 Pac. 379 (1901).

cross-examiner could have questioned the expert by using the authorities from memory. Finally, destroying the defendant's contentions, the court reasoned that there was no tenable objection to the cross-examiner's reading the treatise to the expert. In fact, the court said it was a more exact method and less liable to make a wrong impression in the mind of the juror, than to cross-examine from memory.

In the case of *Scullin v. Vinning*[109] the defendant contended that there was reversible error in that the plaintiff's counsel, during cross-examination of the defendant's expert witness, was permitted to use medical treatises. The court, in holding this procedure not to be error, cited a number of cases from other jurisdictions which upheld its view. After stating that there was a decided conflict of authorities as to the use of a treatise on cross-examination where the expert does not base his opinion on that treatise, the court approved its use by declaring that no better way could be devised for testing an expert's knowledge than to take the accepted authorities upon the subject and see how the expert witness' knowledge of the matter corresponded with that of the authorities.

C. What Purposes Treatises Are to Serve When Admitted

Of the jurisdictions that allow the use of learned treatises during cross-examination, there is considerable difference as to *what purpose* the treatises are to serve when they are admitted. Generally, the jurisdictions can be divided into two lines of thought: (1) the jurisdictions which admit the treatises to impeach or discredit the expert; and (2) those which admit the treatises to test the qualifications of the expert. The lines of admissibility are not always clear and jurisdictions often give one or several of the purposes in a particular case.

(1) To Impeach, Test, Qualify, or Contradict the Expert

Nebraska is an example of a jurisdiction which has changed its reasons several times. In a bastardy action[110] tried in 1886, the court allowed cross-examination with treatises, seemingly for the main purpose of testing the expert witness. The defendant contended as error the fact that his expert medical witness was cross-examined by reference to authorities. The supreme court held the cross-examination acceptable, reasoning that it was impossible for an expert to form an opinion about such a subject as obstetrics and not rely in part upon the authorities in that field. The purpose of allowing the use of the treatise was explained by the court thusly:

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[109]127 Ark. 124, 191 S.W. 924 (1917).

[110]Hutchinson v. State, 19 Neb. 262, 27 N.W. 113 (1886).

> For the purpose, therefore, of testifying as to his recollection, as well as his knowledge, it was proper to interrogate him as to the teaching of those authorities; and, in case his testimony was incorrect, to confront him with them, in order that he might be corrected, and the jury thus be rendered able to judge of the weight to which his testimony was entitled.[111]

In a 1922 case[112] in this same jurisdiction the court gave as its reasons for allowing the use of a treatise on cross-examination that the treatise was not admitted as substantive evidence, but to discredit or impeach the expert witness. In 1940[113] the same court allowed cross-examination of defendant's expert with authorities, concluding that case law generally allowed an expert witness to be cross-examined by reference to such authorities. The court added that the authorities in question were not offered in evidence but that they were used merely to test the knowledge of the expert witnesses.

The federal courts seem to use the purpose of testing the expert more than they do the other reasons. In an appeal from the District Court for the Western District of Washington,[114] the defendant claimed that error was committed in allowing the plaintiff's counsel to cross-examine the defendant's expert witness by using authorities. The court, on appeal, held that this practice was permissible to test the knowledge, accuracy, and credibility of the expert witness. The same language was used in the federal case of *Atlanta Corp. v. Olesen.*[115] In this case the use of treatises was also attempted on direct examination with the court giving as its reason for refusing to allow this practice that although allowable on cross-examination, a different rule applied to direct examination. A federal court in the District of Columbia[116] set forth its interpretation of the general federal rule and the reason for that rule by saying:

> It is the rule in the Federal courts that on cross-examination an expert may be interrogated concerning his knowledge of text-books, treatises, articles, and other publications in his field, and that he may be confronted with extracts from them and asked whether he is familiar with them and whether he agrees with them . . . . The rationale of the rule is that such cross-examination tests the expert witness' credibility and reliability by inquiring as to the extent of his familarity with authorities in his speciality and by asking him whether he agrees with them.[117]

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[111] *Id.*, 27 N.W. at 116.

[112] Oliverius v. Wicks, 107 Neb. 821, 187 N.W. 73 (1922).

[113] Fonda v. Northwestern Pub. Serv. Co., 138 Neb. 262, 292 N.W. 712 (1940).

[114] American Pac. Whaling Co. v. Kristensen, 93 F.2d 17 (9th Cir. 1937).

[115] 124 F. Supp. 482 (S.D. Cal. 1954).

[116] Stottlemire v. Cawood, 215 F. Supp. 266 (D.C. 1963).

[117] *Id.* at 267-68.

The court added that these authorities did not become affirmative evidence.

In California, as in many other jurisdictions, the courts in various cases often give different reasons for allowing treatises to be used during cross-examination. In a forgery case[118] decided in 1935, the court confused *when* the treatises could be used on cross-examination with the *purpose* they were to serve when so used. The reviewing court upheld the trial court's admission of the treatises. The court, after stating the general rule of inadmissibility on direct examination said, "the rule is otherwise upon cross-examination where . . . the witness has testified that he relies upon certain works or where the purpose is to test the competency of the expert."[119] Further beclouding their stand some four years later, the Supreme Court of California[120] held the lower court in error in refusing plaintiff's counsel the right to cross-examine the defendant's expert witness with treatises. The court reasoned that the rule of inadmissibility on direct examination was subject to the qualification that textbooks relied upon by an expert witness could be used as a foundation for impeaching on cross-examination.

In Idaho the supreme court held in an appeal of a malpractice action[121] that although treatises were not admissible as substantive evidence, they could be used during cross-examination of an expert to test his knowledge and accuracy. In an action for personal injuries in the state of Washington,[122] the supreme court upheld the lower court's ruling in allowing the cross-examiner to use treatises. The court justified its decision by stating that the treatises were used for the purpose of testing the expert's knowledge of the particular subject. Also, in a Missouri[123] action to recover disability benefits from the defendant insurance company, the plaintiff's expert was cross-examined by reference to the American Medical Association Journal. The court permitted this, reasoning that the use of learned treatises during cross-examination to test the witness' learning was legitimate.

A case[124] decided in New Jersey was extremely restrictive as to when and for what purpose it would allow the use of a treatise. The court took the narrow view by holding that treatises were admissible as evidence only when a witness had referred to them as authority for

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[118]People v. Hooper, 10 Cal. App. 2d 332, 51 P.2d 1131 (Dist. Ct. App. 1935).

[119]*Id.*, 51 P.2d at 1133.

[120]Lewis v. Johnson, 12 Cal. 2d 558, 86 P.2d 99 (1939).

[121]Osborn v. Cary, 28 Idaho 89, 152 Pac. 473 (1915).

[122]Clukey v. Seattle Elec. Co., 27 Wash. 70, 67 Pac. 379 (1901).

[123]Wiener v. Mutual Life Ins. Co., 352 Mo. 673, 179 S.W.2d 39 (1944).

[124]State v. MacRorie, 86 N.J.L. 401, 92 Atl. 578 (Sup. Ct. 1914).

his opinion, and then they were receivable only for the purpose of contradicting the expert. An 1898 Florida case[125] established the proposition in that state that treatises relied on by an expert witness could be used to contradict him. The court determined that specified books may be introduced in rebuttal to contradict an expert who has testified to having derived therefrom teachings which they do not contain, or whose teachings are substantially dissimilar to his testimony.

The Supreme Court of Louisiana clarified that state's position as to the purposes for which treatises may be used during cross-examination. The court reasoned:

> The cross-examination of an expert witness, by reference to medical and other authorities, is generally sanctioned for the purpose of testing his knowledge, background and accuracy. And, to this end, quotations may be read to the witness from standard treatises, provided that the object is not to get their contents and the opinions of the authority before the jury.[126]

The leading case[127] in Mississippi on the subject of cross-examination with treatises states that they may be used and introduced into evidence, but it does not discuss the purpose which such use and introduction is to serve.

(2) As Substantive Evidence

Although the jurisdictions which allow treatises to be used on cross-examination to impeach, test, discredit, qualify, etc. are numerous, very few jurisdictions allow the treatises to be used as substantive evidence on cross-examination. As said before, the jurisdictions which use treatises as substantive evidence on direct examination find no difficulty admitting them as substantive evidence on cross-examination.[128] Alabama seems to be the only jurisdiction which admits the treatises as substantive evidence pursuant to common law.[129] The states of South Carolina,[130] Nevada,[131] and Massachusetts[132] admit the treatises as substantive evidence pursuant to statute, but only for limited purposes. The states of

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[125]Eggart v. State, 40 Fla. 527, 25 So. 144 (1898).

[126]State v. Sauls, 226 La. 694, 77 So. 2d 8 (1954).

[127]See City of Laurel v. Upton, 175 So. 2d 621 (Miss. 1965).

[128]See, *e.g.*, Barfield v. South Highland Infirmary, 191 Ala. 553, 68 So. 30 (1915).

[129]See, *e.g.*, Stoudnmeier v. Williamson, 29 Ala. 558 (1857).

[130]See S.C. Code Ann. § 26-142 (1962).

[131]See Nev. Rev. Stat. § 51-040 (1965).

[132]See Mass. Ann. Laws ch. 233, § 79c (1956).

California,[133] Idaho,[134] Utah,[135] and Montana[136] have identical statutes which admit historical works, books of science or art, and maps or charts as substantive evidence when such writings are made by persons indifferent to the parties of the action. The statutes hold the above writings to be "prima facie" evidence of facts of common knowledge. Iowa[137] and Nebraska[138] have similar statutes, with the exception that theirs read "presumptive evidence" instead of "prima facie."

V. Conclusion

From the foregoing sections concerning the use and introduction of books of exact science, treatises used during direct examination of an expert witness, and treatises used during cross-examination of an expert witness, certain generalizations can be drawn. As to books of exact science, the general rule in the majority of jurisdictions is that they are admissible into evidence. It can readily be seen why this is true. The material in these books is usually either a mathematics table or computation. The standard objections (*i.e.*, no cross-examination, not subject to the oath, only an opinion of the author, etc.) are inapplicable here because the material is as certain or exact as man-made material can be. The books of exact science which contain material other than tables or computations are admitted because they have come to be accepted by society as standard or dependable. In other words, they have been proved throughout the years to be trustworthy, so the courts now accept them as evidence of the statements contained therein. The authorities in Mississippi for admitting books of exact science are the before mentioned cases of *Tucker v. Donald*,[139] *Harris v. Pound*,[140] and *Tucker v. Gurley*.[141]

The use of learned treatises on direct examination of an expert witness has not enjoyed the general admissibility of books on exact science. Various reasons have been given by the courts for refusing the admission of treatises as substantive evidence. The most common objections are that the theories advanced in these treatises are constantly changing, the subject matter is not exact, the writer is not subject to cross-examination nor is he under oath, and the treatises are hearsay.

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[133]See Cal. Civ. Proc. § 1936 (1955).
[134]See Idaho Code Ann. § 9-402 (1948).
[135]See Utah Code Ann. § 78-25-6 (1953).
[136]See Mont. Rev. Codes Ann. § 98-1101-8 (1964).
[137]See Iowa Code Ann. § 622.23 (1950).
[138]See Neb. Rev. Stat. § 25-1218 (1956).
[139]60 Miss. 460 (1882).
[140]185 Miss. 688, 187 So. 891 (1939).
[141]179 Miss. 412, 176 So. 279 (1937).

Despite these objections some jurisdictions do admit the treatises. Maine would seem to admit them when the opposing party has consented. Alabama admits the treatises as substantive evidence pursuant to common law. The states of South Carolina, Nevada, and Massachusetts allow the treatises into evidence by statute, but only in specific cases. California, Montana, Idaho, Iowa, Nebraska, and Utah have statutes which admit various works, including learned treatises as prima facie or presumptive evidence. There are a few jurisdictions which apparently permit use of the treatises on direct examination to support or corroborate the opinion of the expert witness; but, contrary to *American Jurisprudence,* this does not seem to be the general rule.

The use and introduction of learned treatises on cross-examination of an expert witness is generally allowed, and the trend seems to be toward a more liberal view. Most of the same objections that pertain to allowing the treatises on direct examination apply to cross-examination. There is a difference of opinion in the jurisdictions as to when the treatises can be admitted. A rough classification can be made by dividing the jurisdictions into three general areas for admitting the treatises, such as: (1) when the expert witness has relied on or cited the treatise as authority; (2) when the expert witness either recognizes or acknowledges the treatise to be authoritative; and (3) the more liberal jurisdictions which admit the treatise even if the expert witness denies that the treatise is authoritative. Jurisdictions give various reasons for allowing the treatises used on cross-examination, but generally they list one or more of the following: to impeach, discredit, rebut, test, qualify, or contradict. It is difficult to categorize because jurisdictions often use different reasons for each case. Mississippi has recently joined the majority ranks with the decision in *City of Laurel v. Upton.*[142] This case is authority for the proposition that learned treatises may be used in cross-examining an expert witness when the expert has used and considered them in forming his opinion. The court was silent on the point of what purpose the treatises were to serve.

It is submitted that the advantages of admitting the treatises on direct and cross-examination far outweigh the disadvantages. Some of the advantages are:[143] the author of the treatise would have no motive to misrepresent or falsify his opinion because the treatise would usually not be written with a view toward litigation; the treatise would be a way of getting an unbiased, nonpartisan opinion, for the writer would usually be neutral; and, the author would likely be impartial because of the fact that his writing would be read by other experts in the same field. Allowing the use and introduction of learned treatises during the

[142]175 So. 2d 621 (Miss. 1965).

[143]See 6 WIGMORE, EVIDENCE § 1692 (3d ed. 1940).

questioning of an expert witness also would expedite the trial of a case. Some of the obvious benefits of such use and introduction would be: the treatises could be used on cross-examination to test, impeach, discredit, etc. the expert witness, tending to insure that the expert was a bona fide authority in his field; also, on cross-examination the treatises could be introduced as substantive evidence to rebut the expert; and, on direct examination the treatise could be used to corroborate the expert's testimony. It is not intended that the treatises be used to supplant the expert, but that they be used to enhance the expert's contribution to the trial.

George M. Fleming

STUDENT NOTES

Constitutional Law—Validity of Loyalty Oaths Required of State Employees

Whether an individual's freedom of association is to be subordinated by any particular governmental interest has been a continuous enigma to courts. That question has often been raised with regard to statutes requiring loyalty oaths as prerequisites to state employment. The problem has often been resolved in favor of such statutes, but in many instances courts have found that an individual's rights have thereby been unconstitutionally infringed. It seems that the basic issue involved may be reduced to a question of whether public employment is a "mere privilege," or whether it is a right. An analysis of the leading cases involving this basic problem indicates that the courts are moving away from the "privilege" theory, and are presently recognizing public employment as a *right,* subject only to a showing of proper qualifications for the job sought.

If the states desire to maintain their internal security by requiring loyalty oaths from their employees, they will be required in the future to draft such loyalty oaths in a manner which will specifically advise their employees what will be expected of them. An important case decided recently seems to support this proposition.

An Arizona statute[1] required public employees to sign an oath of allegiance to the United States and Arizona. A penal gloss was added to that statute providing for a perjury prosecution against and discharge from employment of anyone who took the oath and then knowingly joined any organization which had as one of its purposes the violent overthrow of the state or national government.[2] A teacher, covered by the statute as a state employee, brought a suit for declaratory relief, alleging that she could not take the oath in good conscience, not knowing what it meant and having no way to ascertain such. The statute was upheld and the decision was affirmed in the Supreme Court of Arizona. The petitioner appealed to the United States Supreme Court challenging the constitutionality of the oath as a deprivation of the first amendment guarantee of freedom of association made applicable to the states through the fourteenth amendment. The Supreme Court reversed, holding that a loyalty oath and its accompanying penal provision is an unconstitutional infringement upon protected freedoms, where the statute might be held by the state courts to apply to an individual lacking specific intent to promote the illegal aims of the organization. *Elfbrandt v. Russell,* 86 Sup. Ct. 1238 (1966).

That a public employee, such as a policeman, is required to subordinate some of his individual freedoms in order to obtain and keep a job was recognized in an early decision by Justice Holmes, when he stated that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[3] There are a great

[1] Ariz. Rev. Stat. Ann. § 38-231 (1956).

[2] Ariz. Rev. Stat. Ann. § 38-231(e) (Supp. 1965).

[3] McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 29 N.E. 517 (1892).

number of other decisions which hold to that same general principle, and it appears to be well-settled that a state may place reasonable conditions on the "privilege" of public employment.[4] The *Elfbrandt* decision, however, poses the basic question of whether public employment can any longer be considered a mere "privilege." A survey of some of the leading cases before *Elfbrandt* will be helpful in considering recent decisions in their proper perspective.

The problem of balancing governmental interests against the individual's freedom of association became acute during the period immediately following the Civil War. Loyalty oaths were made requisites for certain occupations as security against those who had formerly opposed the Union. The United States Supreme Court held invalid one such statute which required an oath of ministers. The Court's rationale was that there was no relationship between one's having left the Union during the Civil War and his qualifications as a minister.[5] The Supreme Court has repeatedly held that statutes touching the right of freedom of association must be narrowly drawn. Specific conduct may be punished only when it constitutes a "clear and present danger" to the substantial interests of the state.[6]

Before 1952 the case of *United Pub. Workers v. Mitchell*[7] was a leading authority for the proposition that there is no "right" to public employment on one's own terms. There a roller in a United States mint was discharged pursuant to a federal act[8] which prohibited federal employees from taking any active part in political management or in political campaigns. The Supreme Court denied his petition for relief on the ground that Congress had a legitimate security interest to protect in placing restrictions upon the political activities of government employees.[9] The Court cited as its leading authority an 1882 case,[10] which held that Congress was competent to punish criminally any subordinate federal employee who exchanged political contributions with any other governmental employee.

In 1950 a New Jersey loyalty oath statute was struck down because the provisions of the state constitution relative to oaths of office were held to be exclusive and could not be supplemented by statute. Further, there was no statutory prohibition of the holding of public office by subversives.[11] That same year, however, a statutory loyalty oath of Maryland was examined and found valid because the oath was supplemental to a statute barring subversives from public office.[12] One year later a case arose in California where thirty-nine professors refused to sign an oath which was a statutory prerequisite to state employment. The provision was held invalid since the state constitution

[4]*E.g.*, United States v. Wurzbach, 280 U.S. 396 (1930).

[5]Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 319 (1867).

[6]See, *e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).

[7]330 U.S. 75 (1947).

[8]HATCH ACT, § 9(a), 18 U.S.C. § 6(h) (Supp. V. 1939).

[9]United Pub. Workers v. Mitchell, 330 U.S. 75, 101 (1947).

[10]*Ex parte* Curtis, 106 U.S. 371 (1882).

[11]See Imbrie v. Marsh, 3 N.J. 578, 71 A.2d 352 (1950).

[12]See Shub v. Simpson, 76 A.2d 332 (Md. 1950).

provided that none other than the constitutional oath might be required.[13]

It appears that the three above mentioned decisions did not touch the basic issue of statutory vagueness as did *Elfbrandt*. In the two cases set out below, the courts recognized the vagueness of the statutes involved, but looked to the previous judicial interpretations of the acts by the state courts in order to determine their validity. In *Garner v. Board of Pub. Works*,[14] a case arising from the state of California, the United States Supreme Court considered a state statute which required affirmation of nonaffiliation with proscribed groups for the five immediately preceding years. The rationale of the decision upholding the statute was that, in previous decisions, the Supreme Court of California had looked beyond the vagueness of the statute and had required that the employee be aware of the character of the organization before the law applied. New York's Feinberg Act,[15] making membership in certain listed organization prima facie evidence of a teacher's disloyalty, was upheld by the Supreme Court in *Adler v. Board of Education*,[16] because the New York courts had always construed the statute as placing the burden of proof on the person making the charge of disloyalty once evidence of loyalty was introduced.*

In *Wieman v. Updegraff*,[17] however, an Oklahoma statute was struck down because of the state court's refusal to require the element of scienter in the oath. The case arose when a citizen and taxpayer sought to enjoin payment of salaries to teachers who had not taken an oath required by statute.[18] The United States Supreme Court held that the statute indiscriminately classified innocent along with knowing behavior and was, therefore, unconstitutional.[19] As early as 1953 one author commenting on the above case indicated that the decision might mean that the Supreme Court would soon view public employment as "property" within the meaning of the due process clause.[20]

It has been held that in order to meet the requirements of due process, a state must give an employee a hearing to determine if he had knowledge of the purpose of the subversive organization of which

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[13]Tolman v. Underhill, 229 P.2d 447 (Cal. App. 1951).

[14]341 U.S. 716, 723 (1951).

[15]N.Y. Educ. Laws § 3022 (1953).

[16]342 U.S. 485, 495 (1952).

*Since this note was prepared for publication, the case of *Keyishian v. Board of Regents*, 35 L.W. 4152 (January 23, 1967) was handed down by the United State Supreme Court which almost completely vitiates the *Adler* decision. The Court stated that since *Adler*, pertinent constitutional doctrines have rejected the premises on which that decision rested. The majority felt that *Elfbrandt* now states the governing standard: legislation penalizing either membership unaccompanied by specific intent to further the unlawful goals of the organization or nonactive membership violates constitutional limitations.

[17]344 U.S. 183, 191 (1952).

[18]Okla. Stat. Ann. tit. 51, § 37.2 (1951).

[19]Wieman v. Updegraff, 344 U.S. 183, 191 (1952).

[20]7 Miami L.Q. 578-80 (1953).

he was charged with being a member.[21] However, in *Speiser v. Randall*,[22] the Supreme Court completely disregarded a statutory provision for a hearing and held that to place the burden of proving innocence on those charged was a violation of due process.

In *Uphaus v. Wyman*[23] it was held that the New Hampshire Subversive Activities Act of 1951[24] was not pre-empted by the Smith Act,[25] a federal act directed against subversion. The states, therefore, still have the power to legislate in the area of internal security. The loyalty provision was held valid, and *Wieman v. Updegraff* was distinguished on the ground that *Updegraff* involved criminal prosecutions, while *Uphaus* related only to a legislative investigation.[26]

Until 1960 an Arkansas statute required each teacher to submit to the governing authorities a list of every organization to which he belonged. A false statement on the accompanying affidavit subjected the teacher to prosecution for perjury, discharge from employment, and revocation of license. The Supreme Court reviewed the particular statute in *Shelton v. Tucker*,[27] and held it unconstitutional on the ground that forced disclosure of associational ties, such as religious or social memberships which are completely unrelated to occupational fitness, is an unjustified restriction upon freedom of association.[28]

Cramp v. Board Pub. of Instruction[29] involved consideration of the validity of a statute which required state employees to swear that they had never lent their aid, support, advice, counsel, or influence to the communist party. As phrased, the statute covered far more people than those actually participating in a plan of active subversion. The Court invalidated the act because, in future decisions, the state courts might apply the act to one who had "given aid" to communists even though the cause he favored be entirely legal.[30]

That the Supreme Court will be hesitant to uphold convictions under laws which might punish less than illegal intent on the part of those sought to be covered by the statute was further evidenced by the decision in *Noto v. United States*[31] in which a conviction under the Smith Act was reversed. The Court held that evidence of mere remarks by the defendant that individuals hostile to the communist party would one day be shot is not enough for a conviction, and emphasized that there must be convincing evidence that the defendant would use unlawful means to further the illegal aims of the communists.[32]

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[21]See Slochower v. Board of Higher Education, 350 U.S. 551 (1956).

[22]357 U.S. 513, 526 (1958).

[23]360 U.S. 72, 76-77 (1959).

[24]N.H. REV. STAT. ANN., ch. 588, § 1-16 (1955).

[25]18 U.S.C. § 2385 (1956).

[26]Uphaus v. Wyman, 360 U.S. 72, 79 (1959).

[27]364 U.S. 479 (1960).

[28]*Id.* at 488.

[29]368 U.S. 278 (1961).

[30]*Id.* at 286.

[31]367 U.S. 290 (1961).

[32]*Id.* at 298.

In the landmark case of *Baggett v. Bullitt*,[33] the Supreme Court struck down a Washington statute which required state employees to swear that they were not members of the communist party or any other subversive group. The Court reasoned that those who were conscientious about their oaths and who were concerned over the punishments imposed by the statute's ambiguous terms would restrict their conduct to that which was unquestionably safe in order to avoid the risk of losing their jobs.[34]

It is apparent from the foregoing survey of cases that there are certain fundamental reasons for either upholding or invalidating loyalty oath statutes. Aside from technical grounds, the main bases for upholding such statutes seem to be either that a governmental body's security interest is held to outweigh an individual's freedom, or the statute in question had previously been construed as requiring scienter.[35] On the other hand, grounds for holding a given statute invalid include its incorrigible vagueness, its immensely broad possible application, or its positing the burden of proof on the one in danger of losing his position rather than on the state.[36]

Although only eighteen states specifically exclude "subversive" persons from public employment, some twenty-seven of the states bar them from teaching in public schools and state universities.[37] Mississippi is one of twenty-three jurisdictions which has enacted a statutory oath for its teachers.[38] Every public employee in Mississippi is required by statute to sign an affidavit of loyalty to the state and to the United States.[39] Mississippi's statutes regarding subversives are tailored after Maryland's anti-subversion act of 1949[40] which is still on the books as originally enacted. Mississippi Code Annotated sections 4064-09 and 4064-10 provide that a person making a false statement on the affidavit is subject to a perjury prosecution. It is interesting to note that a similar loyalty oath and penal provision was invalidated in *Elfbrandt*. The basic distinction between the two acts is that Mississippi Code Annotated section 4064-06 provides a hearing for those charged with being subversive, while the Arizona statute did not.

Although one might logically presume that a statute might meet constitutional standards if a hearing is provided, such a provision is certainly not conclusive of the validity of the act.[41] In *Baggett*, the statute[42] declared unconstitutional had provided a hearing for those who were suspected of being subversive, but the Court gave very little consideration to the provision. The basis for the decision seems to be that

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[33]377 U.S. 360 (1964).

[34]*Id.* at 372.

[35]See, *e.g.*, Adler v. Board of Educ., 342 U.S. 485 (1952).

[36]See, *e.g.*, Speiser v. Randall, 357 U.S. 513 (1958).

[37]Gellhorn, The States and Subversion, 408-10 (1952).

[38]*Id.* at 410.

[39]Miss. Code Ann. § 4064-05 (1956).

[40]Md. Ann. Code, Art. 85A, § § 1-19 (1957).

[41]See, *e.g.*, Speiser v. Randall, 357 U.S. 513, 526 (1958).

[42]Wash. Rev. Code § 9.81.090 (1950).

the statute was simply unconstitutionally vague.[43] The Court said that an assertion that a prosecutor's sense of fairness would prevent an unjust perjury conviction was not sufficient to sustain the statute. The possibility of one's being prosecuted for knowing but completely innocent behavior, was too great and the statute could not stand.[44]

In *Speiser v. Randall*, the veterans who were threatened with having their tax exemptions revoked were to be afforded a hearing at which they might show themselves not to be subversive. The Supreme Court disregarded the provision and considered the procedure a denial of due process, saying that particular speech often falls very close to the unlawful.[45] The Court felt that there was too great a danger that lawful speech would be discouraged since "the man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear these burdens."[46]

It is submitted that the dissenting opinion of Justice Douglas in the *Adler* case is directly in line with the *current* attitude of the Supreme Court toward these hearings. He said:

> The mere fact of membership in the organization raises a prima facie case of her own guilt. She may, it is said, show her innocence. But innocence in this case turns on knowledge; and when the witch hunt is on, one who must rely on ignorance leans on a feeble reed.[47]

Section 4064-05 of Mississippi Code Annotated requiring a loyalty oath states unequivocally that "any person failing or refusing to execute such a statement . . . shall *immediately be discharged.*"[48] Although a hearing is provided after the employee is discharged, it is of questionable value if an employee must first be subjected to the humiliation of being discharged. He is looked upon by the school board, his fellow employees, and the general community as a person to be carefully watched and whose every act should be scrutinized. It can well be argued that the employee would rather sign the oath out of fear, than give due consideration to the seriousness of his oath.

One can hardly deny that there are strong arguments which can be made against the *Elfbrandt* decision. One such argument is that a state has a right to ascertain the loyalty of those whom it places in positions of great trust. Taxpayers have a right to know that the form of government which a majority of them support is not being vitiated from within. The danger caused by the presence of subversives in the country is sufficiently grave already without allowing them to use the facilities of government to more effectively attain their illegal goals.

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[43]See Baggett v. Bullitt, 377 U.S. 360, 374 (1963).

[44]*Id.* at 373.

[45]357 U.S. 513, 526 (1958).

[46]*Ibid.*

[47]Alder v. Board of Educ., 342 U.S. 485, 509 (1952) (Douglas, J., dissenting).

[48](Emphasis added.)

It can further be argued, particularly in criticism of the *Shelton* decision invalidating a statute requiring teachers to list all organizations of which they were members, that a subversive teacher is in a position to exert a great influence over the lives of the children who have been entrusted to his care. A teacher imparts to his impressionable pupils far more than mere formal classroom instruction. In light of the foregoing contentions one might quickly ask why a state in a democratic society cannot exclude all those teachers who might possibly have communist or other subversive affiliations. One might argue that a statute providing for such exclusion does not infringe upon anyone's political beliefs or associations, but merely prevents subversive persons from using the positions made available to them by the state as instruments for spreading their particular ideology.

It is submitted that the above analysis is somewhat superficial when viewed in the light of a more vital issue. The real problem appears to revolve around the question of whether public employment is a privilege to be conferred by the state at its discretion or whether it is a *right* which every citizen with "proper qualifications" may claim. It appears that the trend of decisions in the last several years suggests that public employment is, or will soon be, a right. Should the trend continue with but little expansion of *Elfbrandt,* a state will be required to choose its employees solely on the basis of their competence for the particular job, notwithstanding political beliefs or activities. It is urged that this is *not* the best solution, but rather that fundamentally fairer loyalty statutes should be employed by the states.

Can it be said that the present loyalty oath provisions of Mississippi are reasonable, assuming that a state has a legitimate security interest to protect? The answer would seem to be that the *purpose* of the provisions—to ferret out subversives from state governmental and educational institutions—is a legitimate and reasonable one. The fundamental fault, therefore, in the state's attempt to maintain internal security is in the methods employed in that effort. The statutes in question make no provision that anyone required to sign an oath of loyalty can receive a hearing or an explanation as to their meaning or implications *before* he finds himself in grave danger of being discharged. It is urged that the Mississippi loyalty statutes be amended to include such a provision. No state wherein such statutes have been attacked has ever ventured to provide such fundamental fairness within the statute itself.

Without the safeguards that the recent decisions seem to require, there is too great a danger that innocent people may refrain from joining legitimate and worthwhile organizations. For example, a university professor might well decline to join a project for cancer research because the other members are from communist bloc nations. Fear becomes the motivation for being "loyal" and, therefore, by no means are "subversive" persons the only ones who are punished by such a statute. It is pointedly the vagueness of Mississippi's loyalty oath provisions which is objectionable. Today it seems apparent that the United States Supreme Court will invalidate any loyalty act which might be held to apply to anyone lacking scienter. A federal district court sitting in Mississippi has recently issued a permanent injunction against the enforcement of Missis-

sippi Code Annotated sections 6282-41 through 6282-45 which required that a teacher list all organizational affiliations as a condition to employment.[49] The decision is directly in line with *Shelton*, which declared virtually identical provisions unconstitutional, and may be a signal that the Mississippi loyalty provisions are also in line for attack.

In the absence of a statutory amendment, it is suggested that the Mississippi courts interpret narrowly the loyalty statutes for state employees so that sections 4064-01 through 4064-10 will apply to or punish not mere membership, but knowing and willful participation in the illegal aims of a "subversive" organization whose purposes are known to the person sought to be covered by the statute. It is conceded that communist ideology may be spread subtly through lawful organizations, but this is little justification for leaving a state employee with no guidelines as to the character of the organizations to which he may safely belong. The imposition of fear and blind obedience through indefinite laws is hardly a proper method of insuring the democratic way of life for future generations. It is submitted that the above is essentially the rationale underlying the invalidation of the *Elfbrandt* loyalty oath statute. It is further submitted that, as they now stand, Mississippi Code Annotated sections 4064-01 through 4064-10, particularly those subsections dealing principally with loyalty requirements for state employees, are highly vulnerable to the same attacks as those leveled against the statute declared unconstitutional in *Elfbrandt*.

Martin A. Kilpatrick

Insurance—The Duty to Defend Determined by Factors Other Than Allegations of Complaint

It appears to be well settled that the obligation of a liability insurance company under a policy provision requiring it to defend an action against the insured is determined by the allegations of the complaint.[1] However, the courts of the various jurisdictions have had difficulty in applying this rule to the situation where there is a conflict between the alleged facts and the actual facts as known by the insurer.

The rule followed in Mississippi requires the insurer to defend where the allegations of the third party complainant bring the suit within the coverage of the policy, irrespective of extraneous facts showing non-coverage.[2] Recently the Mississippi Supreme Court faced, for the first time, a situation in which the allegations of the complaint showed non-coverage, but extraneous facts known to the insurance

[49]Mississippi State Conference, American Ass'n of University Professors v. E. A. Holmes, Civil No. WC 6625, N.D. Miss. July 21, 1966.

[1]*E.g.*, Commercial Cas. Ins. Co. v. Tri-State Transit Co. 190 Miss. 560, 1 So. 2d 221 (1941); see generally Annot., 50 A.L.R.2d 458 (1956), 7A Appleman, Insurance § 4683 (1942).

[2]See United States Fid. & Guar. Co. v. Yazoo Cooperage Co., 157 Miss. 27, 127 So. 579 (1930).

company showed probable coverage. In *Mavar Shrimp & Oyster Co. v. United States Fid. & Guar. Co.*[3] an insurer, under a general liability policy, had contracted to idemnify the insured for any liability which it might incur as a result of any bodily injury sustained in the loading and unloading of fishing boats on the insured's premises. Section II of the policy provided that "as respects the insurance afforded by the other terms of this policy the Company shall: (a) defend any suit against the Insured alleging such injury . . . even if such suit is groundless, false, or fraudulent." Similar or identical provisions are found in most liability insurance policies.[4] An exclusion clause in the policy excepted from coverage injuries sustained by employees of the insured. In an action against the insured, one Rodolfich alleged that he was injured while in the employ of the insured. The injury occurred when the complainant was ordered to remove a board from a fishing vessel moored at the insured's wharf. After the insurance company had refused a request to defend, the insured employed its own counsel and reached a settlement with Rodolfich before judgment was rendered.

Subsequent to this settlement the insured brought an action against the insurer, alleging that the insurance company, by refusing to defend, had breached its contract. Recovery was sought for the amount of settlement and the cost of defense of the earlier suit by Rodolfich against the insured. The trial court held in favor of the insurer, but on appeal the supreme court reversed. The court held that since the insurer knew that the insured had contended that the injured party was not an employee, and that the insured had been successful in such a contention in previous similar cases, the insurer was bound to defend the suit. Since it had not defended the suit, the insurer was adjudged liable for the attorney's fees, court costs, and the amount of the settlement. Thus the court held, in effect, that the ascertainable facts, not the allegations of the complaint, controlled the insurance company's duty to defend.

This decision raises the question of why the insurance company is denied the privilege of relying on the known or ascertainable facts when they show non-coverage,[5] and yet is obligated to adhere to the extraneous facts when they show coverage. In answering this question, the Mississippi court quoted from a Georgia case,[6] which in turn relied on a federal court of appeals case[7] applying Vermont law. The Georgia court said:

> The defendant contends in effect that its obligation must depend uniformly on either the true facts or the allegations of the complaint, and that because the insurer is bound to defend a suit falsely alleging a claim covered by the policy, therefore it is excused from defending a suit alleging facts not covered,

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[3]187 So. 2d 871 (Miss. 1966).

[4]7A APPLEMAN, INSURANCE § 4682, at 428 (1942).

[5]*E.g.*, United States Fid. & Guar. Co. v. Yazoo Cooperage Co., 157 Miss. 27, 127 So. 579 (1930).

[6]Loftin v. United States Fire Ins. Co., 106 Ga. App. 287, 127 S.E.2d 53 (1962).

[7]McGettrick v. Fidelty a Cas. Co., 264 F.2d 883 (2d Cir. 1959).

whether false or not. "The conclusion . . . is a non sequitur."[8]

The Georgia court explained that this conclusion is a non sequitur because the duty to defend in the former instance—*i.e.*, when the complaint falsely alleges a claim covered by the policy—is established by the insurer's explicit undertaking to defend suits "even if . . . groundless, false, or fradulent."[9] The court explains further that in the reverse situation—*i.e.*, where the alleged claim shows non-coverage but the true facts show coverage—the duty to defend arises because the policy is ambiguous on this question and therefore should be construed most favorably toward the insured.[10]

Having adopted the reasoning of the Georgia court, the Mississippi court concluded ". . . that if the obligation requiring the insurance company to defend suits that are groundless, false or fraudulent is to have any real meaning, then under the facts and circumstances of this case, the Insurance Company had the obligation to defend."[11]

In *Womack v. Employers Mut. Liab. Ins. Co.*[12] the court interpreted the undertaking to defend suits even though groundless, false, or fraudulent to mean that it

> [O]bligates the Insurer to so defend even though "such suit is groundless, false or fraudulent," but the suit must be grounded in some state of facts which may give rise to a cause of action under the policy. The declaration may fail to state a good case, and yet the insurer be obligated to defend, if the suit "respects the insurance afforded by the terms of the policy."[13]

In other words the court held that the groundlessness of a suit is determined by whether a good cause of action is stated. Since a groundless suit can be either within or without the coverage of the policy, depending on the allegations of the complaint, the phrase "even though groundless, false, or fraudulent" is superfluous for all practical purposes other than as a clarification of the insurer's duty to "defend *any suit* alleging such injury." (Emphasis added.)

The interpretation of "groundless" in the Georgia case is misleading. That court interpreted the groundlessness of a suit as being determined by whether the complainant alleges true or false facts, not by whether the insured would be ultimately liable under the suit.[14] If that interpre-

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[8]Mavar Shrimp & Oyster Co., v. United States Fid. & Guar. Co., 187 So. 2d 871, 874 (Miss. 1966).

[9]Loftin v. United States Fire Ins. Co., 106 Ga. App. 287, 127 S.E.2d 53, 59 (1962).

[10]*Ibid.*

[11]Mavar Shrimp & Oyster Co. v. United States Fid. & Guar. Co., 187 So. 2d 871, 875 (Miss. 1966).

[12]233 Miss. 110, 101 So. 2d 107 (1958).

[13]*Id.* at 116, 101 So. 2d at 110.

[14]Loftin v. United States Fire Ins. Co., 106 Ga. App. 287, 127 S.E.2d 53, 56-57 (1962).

tation were accepted, it would follow logically that the present case in the Mississippi court was groundless, in that Rodolfich falsely alleged that he was an employee of Mavar.

The Mississippi court further held that the policy provisions concerning the duty to defend were ambiguous. The court felt that the obligation of the insurer to defend a suit in which the allegations show non-coverage, but the insurer knows, or by means of an investigation ascertains, that the allegations are false, was not clearly determined by the language of the policy.[15] Admittedly, the insurer's obligation could have been expressed in more explicit terms. Yet, it seems that a reasonable interpretation of the contract reveals the intentions of the contracting parties. This is especially true in the light of the history of this type liability policy.

The Mississippi Supreme Court considered liability policies almost identical to the one involved here in two earlier decisions and concluded that the clause excepting employees from coverage applied only to the section containing the duty to indemnify, not the section involving the duty to defend.[16] Subsequently, the words "as respects the insurance afforded by the other terms of this policy" were added to the present policy form as a prefix to the section involving the duty to defend. When this prefix is considered with the duty to "defend any suit . . . *alleging such injury,*" the policy appears to be clearly unambiguous. (Emphasis added.) It is an unreasonable construction of the policy to interpret "such injury" as an objective term. "Such injury" can only refer to the injuries insured against in paragraph one, from which employee injuries are specifically excluded.[17] An agreement to defend a suit alleging an injury covered by the policy is not an agreement to defend any other kind of suit. Yet, the Mississippi court states, "if the Insurance Company had intended otherwise, it could have made its intent clear by stating that its obligation to defend was confined to those cases where the declaration alleges facts that come within the coverage of the policy."[18] In so speaking, the court seems only to be rephrasing a provision existing in the policy rather than creating any new terms.

There are relatively few cases which have involved the precise issue presented in *Mavar.* The limited number of jurisdictions which have been faced with this question seems evenly divided and no majority rule is yet distinguishable. Cases in accord with the decision reached in the

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[15]Mavar Shrimp & Oyster Co. v. United States Fid & Guar. Co., 187 So. 2d 871, 874 (Miss. 1966).

[16]Southern Farm Bureau Cas. Ins. Co. v. Logan, 238 Miss. 580, 119 So. 2d 268 (1960); United States Fid. & Guar. Co. v. Cook, 181 Miss. 619, 179 So. 551 (1938).

[17]*E.g.*, Marshall's U.S. Auto Supply v. Maryland Cas. Co., 354 Mo. 455, 189 S.W.2d 529 (1945).

[18]Mavar Shrimp & Oyster Co. v. United States Fid. & Guar. Co., 187 So. 2d 871, 875 (Miss. 1966).

Mavar case can be found in Alabama,[19] Georgia,[20] Idaho,[21] Missouri,[22] Minnesota,[23] Oklahoma,[24] and Vermont.[25] Those jurisdictions holding that the insurer's duty to defend is not affected by the known or ascertainable facts which might show coverage are Arizona,[26] Louisiana,[27] New Mexico,[28] Oregon,[29] Pennsylvania,[30] Rhode Island,[31] Texas,[32] and Washington.[33]

Both of these views are subject to criticism.[34] First, the view adopted by the Mississippi court in *Mavar* is questionable as a reasonable interpretation of the contract. Second, as a result of this holding the insured and insurer are forced into court with different interests. Where the injured party's complaint contains allegations showing non-coverage, the insurance company, which is compelled to provide the defense because of ascertained facts showing potential coverage or because of notification by the insured of the acutal facts, would be serving its best interest if the complainant were awarded a recovery under the allegations as originally pleaded.[35] The insurance company, although required to defend, would be relieved of the duty to indemnify. A third shortcoming of this view is that the insurer might be obligated to defend whenever notified by the insured that the complaint as alleged is erroneous and that the true facts are within coverage.[36] This would lead the insurer frequently to speculate on whether the facts as alleged can be proved.[37]

On the other hand, the view that the known or ascertainable facts are never determinative of the duty to defend also has its vulnerable aspects. Perhaps the major criticism of this view is that it is contrary to public policy. When an action is brought against the insured under circumstances that appear to the layman policyowner to be within coverage of his insurance policy, it is strongly arguable that to allow the

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[19]Pacific Indem. Co. v. Run-A-Ford Co., 276 Ala. 311, 161 So. 2d 789 (1964).

[20]Loftin v. United State Fire Ins. Co., 106 Ga. App. 287, 127 S.E.2d 53 (1962).

[21]Pendlebury v. Western Cas. & Sur. Co., 89 Idaho 480, 406 P.2d 129 (1965).

[22]*E.g.*, Marshall's U.S. Auto Supply v. Maryland Cas. Co., 354 Mo. 455, 189 S.W.2d 529 (1954).

[23]Crum v. Anchor Cas. Co., 264 Minn. 378, 119 N.W.2d 703 (1963).

[24]Hardware Mut. Cas. Co. v. Hilderbrant, 119 F.2d 291 (10th Cir. 1940). (Applying Okla. law.)

[25]McGettrick v. Fidelty & Cas. Co., 264 F.2d 883 (2d Cir. 1959). (Applying Vt. law.)

[26]Paulin v. Fireman's Fund Ins. Co., 1 Ariz. App. 408, 403 P.2d 555 (1965).

[27]Kelly v. United State Fid. & Guar. Co., 76 So. 2d 116 (La. App. 1954).

[28]Harbin v. Assurance Co. of Am., 308 F.2d 748 (10th Cir. 1962). (Applying N.M. law.)

[29]Isenhart v. General Cas. Co. of Am., 233 Ore. 49, 377 P.2d 26 (1962).

[30]Wilson v. Maryland Cas. Co., 377 Pa. 588, 105 A.2d 304 (1954).

[31]Thomas v. American Universal Ins. Co., 80 R.I. 129, 93 A.2d 309 (1952).

[32]Travelers Ins. Co. v. Newsom, 352 S.W.2d 888 (Tex. Civ. App. 1961).

[33]Lawrence v. Northwest Cas. Co., 50 Wash. 2d 282, 311 P.2d 670 (1957).

[34]See generally 30 N.Y.U.L. Rev., 1019 (1955).

[35]Stout v. Grain Dealers Mut. Ins. Co., 307 F.2d 521 (4th Cir. 1962).

[36]Wilson v. Maryland Cas. Co., 377 Pa. 588, 105 A.2d 304 (1954).

[37]Isenhart v. General Cas. Co. of Am., 233 Ore. 49, 377 P.2d 26 (1962).

insurer to escape the duty to defend because of the technicalities of the form contract is unreasonable.[38] If the insurance company intends to restrict its obligations to the explicit provisions of the policy, it must do so in no uncertain terms,[39] and language that proves to be ambiguous to any degree must be construed most strongly against the insurer and most favorably toward the insured.[40]

Another consideration of the courts rejecting the view that the allegations without exception are determinative of the duty to defend is that the insurer usually has two alternatives to risking liability for refusing to defend: (1) it can attempt to defend the suit against the insured under a non-waiver agreement; (2) it can seek a declaratory judgment determining its liability.[41]

Perhaps the principal reason for the diverse decisions on the issue involved here is the frequent failure of the courts to recognize that the duty to indemnify and the duty to defend are separate and independent duties. These are two distinct obligations undertaken by the insurance company in two distinct sections of the policy.[42] This is the only reasonable inference that can be derived from previous decisions in this state.[43] To allow the insurer to escape its liability to indemnify because there is no duty to defend would be as much a misconstruction of the policy as to compel the insurer to defend when no such duty exists. Neither of these two obligations are contingent on the existence of the other. Just as the insurer may be liable to defend although not liable to indemnify,[44] it logically follows that in certain instances the insurer may be liable to indemnify, though there is no duty to defend.[45]

In light of this distinction, the better view is that the allegations in the complaint are determinative of the insurer's duty to defend, irrespective of the known or ascertainable facts. Such a conclusion is bolstered when it is considered that the duty to defend can be attached by either an amendment of the complaint,[46] or proof in court of facts which show coverage.[47]

Such an approach would tend to force the insurer possessing knowledge of extraneous facts to provide the defense rather than to subject itself to ultimate liability for a large recovery resulting from poor litiga-

[38]Loftin v. United States Fire Ins. Co., 106 Ga. App. 287, 127 S.E.2d 53, 57 (1962).

[39]*Id.*, 127 S.E.2d at 58.

[40]*E.g.*, Bauman v. Royalty Indem. Co., 36 N.J. 12, 174 A.2d 585 (1961).

[41]See the discussion on these two procedures in the note, *Insurance Company's Dilemma; Defending Actions Against the Assured*, 2 STAN. L. REV. 383 (1950).

[42]See, *e.g.*, Journal Publishing Co. v. General Cas. Co., 210 F.2d 202 (9th Cir. 1954).

[43]See, *e.g.*, Womack v. Employers Mut. Liability Ins. Co., 233 Miss. 110, 101 So. 2d 107 (1958).

[44]*E.g.*, United States Fid. & Guar. Co. v. Yazoo Cooperage Co., 157 Miss. 27, 127 So. 579 (1930).

[45]*E.g.*, Journal Publishing Co. v. General Cas. Co., 210 F.2d 202 (9th Cir. 1954).

[46]*E.g.*, Lawrence v. Northwest Cas. Co., 50 Wash. 2d 282, 311 P.2d 670 (1957).

[47]*E.g.*, Kelly v. United States Fid. & Guar. Co., 76 So. 2d 116 (La. App. 1954).

tion. On the other hand, if the insurer is confident that the facts are as alleged, it can rightfully refuse to furnish a defense. Although such an approach might allow the insurer to speculate as to what can be proved in court, it would be doing so at its own peril. Also, this approach would prompt the insured to call to the complainant's attention any erroneous allegations showing noncoverage by the policy. It does not seem contrary to public policy to compel the insured, in certain situations, to employ his own defense until he proves coverage by the policy.

Conceivably there are situations in which the insured will be placed in the seemingly unfair position of providing his own defense where he had assumed coverage by the policy.[48] However, even a greater degree of injustice would exist if the insurer should be required to defend until noncoverage is proved.[49]

If the court in *Mavar* had acknowledged the distinction between the duty to indemnify and the duty to defend, there would have been no breach of contract, since the insured, by the terms of the policy, would have been justified in refusing to defend. There would have continued to exist the duty to indemnity, however, provided certain facts were proved. Here, the court was satisfied that the proof showed that the injured party, Rodolfich, was in fact not an employee,[50] thereby bringing the recovery within the coverage afforded by the policy. By the better view, the insurance company in this case should have been held liable for the amount of the settlement, but not for the cost of defense.

Donnie Brock

Taxation—Allowance of Depreciation in Year of Sale

Although the depreciation deduction is one which has a long history, in recent years the Commissioner of Internal Revenue has attempted to deny such an allowance for a year in which an asset is sold at a price greater than its depreciated basis as of the beginning of the year. This note will give a brief history of the deduction, analyze several cases in which the propriety of the deduction for such a year is considered, and summarize the arguments made by the Commissioner and the taxpayers.

A recent case decided by the United States Supreme Court, *Fribourg Nav. Co. v. Commissioner*,[1] upheld the taking of the depreciation deduction for such a year. On December 21, 1955, the taxpayer, Fribourg Navigation Company, purchased a used Liberty Ship for 469,000 dollars.

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[48]A frequent example of this is where there are unsupportable allegations of assault and battery, which is an excepted risk under the liability policy. *E.g.*, Wilson v. Maryland Cas. Co., 377 Pa. 588, 105 A.2d 304 (1954).

[49]See, *e.g.*, Maxon v. Security Ins. Co., 29 Cal. Rptr. 586, 595 (1963).

[50]Mavar Shrimp & Oyster Co. v. United States Fid. & Guar. Co., 187 So. 2d 871, 875 (Miss. 1966).

[1]383 U.S. 272 (1966).

Prior to the purchase the company obtained a letter ruling from the Internal Revenue Service accepting, for depreciation purposes, a useful economic life of the ship of three years, subject to change if required by subsequent experience. The Service also agreed to accept a salvage value for the ship of 54,000 dollars. Deductions were taken on the 1955 and 1956 returns for depreciation, and at the beginning of 1957 the adjusted basis of the ship was 326,627.73 dollars. In July of 1956 Egypt seized the Suez Canal, which became blocked, forcing ships into longer routes. In order to transport the same amount of goods from east to west, more ships were needed. The resulting scarcity of ships caused an increase in their price. In June of 1957 the taxpayer accepted an offer to sell its ship. Delivery was made on December 23, 1957, at a sale price of 695,000 dollars. The taxpayer, having adopted a plan of complete liquidation under section 337 of the Internal Revenue Code of 1954, incurred no tax liability on this sale. On its tax return the taxpayer claimed a deduction for depreciation[2] of 135,367.24 dollars for the 357 1/2 days of 1957 before December 23. The Internal Revenue Service contended that because the value of the ship had increased, the use of the ship had "cost" the taxpayer nothing, and disallowed the deduction. Suit was brought in the Tax Court which sustained the Commissioner,[3] and upon appeal the United States Court of Appeals for the Second Circuit affirmed.[4] The United States Supreme Court reversed the court of appeals and held that the sale of a depreciable asset for an amount greater than its adjusted basis at the beginning of the year does not prevent the deduction of depreciation for that year.

The depreciation deduction is almost as old as the income tax itself.[5] One of the earliest definitive statements concerning the concept and application of the depreciation deduction is found in *United States v. Ludley*:[6]

> The amount of the allowance for depreciation is the sum which should be set aside for the taxable year, in order that, at the end of the useful life of the [asset] in the business, the aggregate of the sums set aside will (with the salvage value) suffice to provide an amount equal to the original cost.

In explaining part of the reasoning behind allowing such a deduction, the Supreme Court in 1943 stated, "The end and purpose of it all is to approximate and reflect the financial consequences to the taxpayer of the subtle effects of time and use on the value of his capital

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[2] INT. REV. CODE OF 1954, § 167 (a) states:
(a) General rule—There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence)—(1) of property used in the trade or business, or (2) of property held for the production of income.

[3] Fribourg Nav. Co., 31 P-H Tax Ct. Mem. 1698 (1962).

[4] Fribourg Nav. Co. v. Commissioner, 335 F.2d 15 (2d Cir. 1964).

[5] REVENUE ACT OF 1918, ch. 18, 40 Stat. 1057, 1067-68, 1078.

[6] 274 U.S. 295, 300-01 (1927).

assets."[7] By the time the 1954 Code, including the relevant section on depreciation, was adopted, the nature and theoretical application of the depreciation deduction was well established.

However, a problem had arisen. Under the Code,[8] if an asset were sold at a price in excess of its depreciated value, the excess was taxed as a capital gain rather than as ordinary income, provided that the conditions for a capital gain were met. The capital gains treatment resulted in a lower tax than would have resulted from the use of ordinary income rates. Because the depreciation deduction resulted in lower taxes figured at ordinary income rates, if the excess were recovered and taxed at capital gains rates, a tax savings resulted. The Commissioner was displeased with such a situation and determined to rectify it. One means by which he attempted to nullify this savings was to disallow the depreciation deduction when the value of the asset had increased. He could allege that the asset had appreciated instead of depreciated.

One of the first and certainly one of the major attempts by the Commissioner to limit the depreciation deduction was the case of *Cohn v. United States*.[9] In 1941 and 1942 the taxpayers had started three flying schools and were training pilots under the Army Air Corps Contract Flying School Program. In 1942, after thorough investigation, the partners concluded that the contracts for operation of these schools would probably terminate about December 31, 1944. Therefore, they depreciated their equipment over a useful life ending on that date. However, their estimate was not accurate, and the Helena school closed in August 1944, and the Pine Bluff and Clarksdale schools in October 1944. The Helena school auctioned off its equipment in August 1944, and the other two in November of 1944. In each instance they received prices greater than the depreciated value.

The Commissioner claimed that the depreciation deduction should be denied. His argument was based on two facts: first, the exact salvage value was known (particularly by the Pine Bluff and Clarksdale schools who knew of the sales price of the Helena assets) prior to taking the last year's depreciation on the assets; second, the sales price was greater than the basis for the assets at the beginning of the year. The court, in sustaining the Commissioner, ruled that it was proper to adjust salvage value at or near the end of the life of the asset in order to bring it more nearly in line with what actual sales of similar articles proved it to be. The court stated:

> Depreciation involves a combination of useful life and salvage, both estimated. If, under certain circumstances, depreciation can be reconsidered through a redetermination of useful life, it would seem logical to permit, at least at the same time, a reconsideration and redetermination of salvage value.[10]

The language of the court in the *Cohn* decision seems to say no

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[7]Detroit Edison Co. v. Commissioner, 319 U.S. 98, 101 (1943).

[8]INT. REV. CODE OF 1939, § 117 (j), 56 Stat. 846.

[9]259 F.2d 371 (6th Cir. 1958).

[10]*Id.* at 378.

more than that when useful life and salvage value are redetermined, it *might,* not *must,* be decided that, in some cases, the salvage value at the beginning of the year should be equivalent to the sale price during the year.[11]

The effect of the *Cohn* decision was a rash of cases in which the Service attempted to eliminate at least part of the capital gains treatment by denying the depreciation deduction in the year of sale. The taxpayer fought to retain the deduction. Both sides had some success.

In 1960 the Supreme Court handed down three decisions on one day concerning depreciation: *Massey Motors v. United States;*[12] *Commissioner v. Evans;*[13] and *Hertz Corp. v. United States.*[14] In the *Massey* case the taxpayer brought suit in the United States district court, which ruled in favor of the taxpayer.[15] The Commissioner appealed to the Court of Appeals for the Fifth Circuit, which reversed the lower court and upheld the Commissioner.[16] The Supreme Court of the United States affirmed the decision of the court of appeals and held for the Commissioner.[17] In *Commissioner v. Evans,* a tax deficiency proceeding, the Commissioner was upheld by the Tax Court.[18] The Court of Appeals for the Ninth Circuit reversed,[19] but the Supreme Court reversed the court of appeals and ruled in favor of the Commissioner.[20] The *Hertz Corp.* action originated in the United States district court as a suit for a refund of taxes. The district court upheld the taxpayer,[21] but the Court of Appeals for the Third Circuit reversed,[22] and was affirmed by the Supreme Court.[23] It can be seen clearly from the case histories that there was confusion and conflict in the application of the depreciation deduction.

These three cases made one point very clear—the useful life of the depreciable asset is to be measured by the estimated use in the taxpayer's business and not by the estimated economic life of the asset.[24] Thus, in calculating the depreciation allowance to be permitted each year, the taxpayer would have to estimate the salvage value at the end of the use in the business rather than at the end of the life of the asset.[25] Therefore, the question of what the salvage value of

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[11]See Wyoming Builders v. United States, 227 F. Supp. 534 (D. Wyo. 1964), *aff'd,* 358 F.2d 672 (10th Cir. 1966); see also 20 J. Taxation 156 (1964).

[12]364 U.S. 92 (1960).

[13]364 U.S. 92 (1960).

[14]364 U.S. 122 (1960).

[15]156 F. Supp. 516 (S.D. Fla. 1957).

[16]264 F.2d 552 (5th Cir. 1959).

[17]364 U.S. 92 (1960).

[18]Robley H. Evans, 26 P-H Tax Ct. Mem. 539 (1957).

[19]264 F.2d 502 (9th Cir. 1959).

[20]364 U.S. 92 (1960).

[21]165 F. Supp. 261 (D. Del. 1958).

[22]268 F.2d 604 (3rd Cir. 1959).

[23]364 U.S. 122 (1960).

[24]Commissioner v. Evans, 364 U.S. 92 (1960); Hertz Corp. v. United States, 364 U.S. 122 (1960); Massey Motors v. United States, 364 U.S. 92 (1960).

[25]Massey Motors v. United States, 364 U.S. 92, 105 (1960).

an asset is at the end of its estimated use in the business becomes of crucial importance. For example, with a fixed number of years of life, assuming a formula including salvage value in the equation, a large variance in the salvage value would produce a wide range in the amount of depreciation that could be taken annually. It could be to the taxpayer's advantage to set as low a salvage value as possible in order to have as great a depreciation deduction as possible. Immediately, the question arises that if salvage value represents the amount for which an asset could be disposed,[26] then would not the best test of this value be the actual sales price when the asset is sold. And, following this reasoning, should not any depreciation which would drop the salvage value to a figure lower than the sales price be disallowed as a depreciation deduction?

A series of cases occurred with these questions presented. In *Randolph D. Rouse*,[27] the taxpayer was a builder and renter of houses. The Tax Court ruled that depreciation deductions would not be allowed for the houses held for investment for years in which the houses were sold for a price in excess of their basis at the beginning of the year. The *Cohn* case was cited as support for this decision.[28]

The next year a United States district court reached the opposite conclusion and allowed the depreciation deduction.[29] The court stated:

> It is my view that the sale price received for the assets does not properly reflect "salvage value." Rather, it merely reflects the value of the property at a particular point of time *prior* to the date at which the estimate of salvage value is to be judged, *i.e.*, at the end of the estimated useful life of the property. The sale merely reflects a probable interim appreciation (or depreciation) in the value of the property due to a variety of factors. The Regulations are quite specific in their renunciation of a fluctuation in market value as a guideline for depreciation allowance.[30]

The *Macabe Co.*[31] decision also accepted the taxpayer's argument. The Tax Court permitted the deduction for depreciation of a building in the year of its sale even though the sales price was greater than both the depreciated basis at the beginning of the year, and the original basis of the building. In reaching its conclusion, the court recognized a distinction between the gradual exhaustion of property through the depreciation process and the appreciation or depreciation of value because of market fluctuation.[32]

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[26]Cohn v. United States, 256 F.2d 371 (6th Cir. 1958).

[27]39 T.C. 70 (1962).

[28]*Ibid.*

[29]S & A Co. v. United States, 218 F. Supp. 677 (D. Minn. 1963), *aff'd*, 338 F.2d 629 (8th Cir. 1964), *cert. denied*, 383 U.S. 942 (1966).

[30]*Id.* at 684; see Treas. Reg. § 1.167 (a)-1 (c) (1956).

[31]42 T.C. 1105 (1964).

[32]*Ibid.*

The acceptance of the taxpayer's position was temporarily withheld in the case of *Motorlease Corp. v. United States*.[33] Here a United States district court allowed depreciation to be taken in the year of sale when the selling price exceeded the adjusted basis.[34] However, the United States Court of Appeals for the Second Circuit reversed the district court and denied the depreciation deduction. Interestingly enough, the court of appeals based its reasoning on the *Fribourg* case, then at the court of appeals stage,[35] which had been decided that same day. The United States Supreme Court has now reversed the court of appeals and has held for the taxpayer.[36]

When analyzing the more recent cases, another factor which must be considered is a revenue ruling which the Commissioner, interpreting the *Cohn* decision as judicial validation of his position, issued in 1962.[37] This regulation states:

> The depreciation deduction for the taxable year of disposition of an asset used in the trade or business or in the production of income, otherwise properly allowable under the taxpayer's method of accounting for depreciation, is limited to the amount, if any, by which the adjusted basis of the asset at the beginning of the year exceeds the amount realized from sale or exchange.

In view of the fact that this was, and still is, a disputed area in the law, several of the arguments made by both the taxpayers and the Commissioner, and used by the courts in reaching their conclusions, should be considered. Both sides can claim the support of the Regulations[38] in reaching a decision favorable to their particular position.

Perhaps the most frequent argument used by the taxpayer[39] for allowing depreciation in the year of sale is based on the sentence in the Regulations, "Salvage value is the amount (*determined at the time of acquisition*) which is *estimated* will be realizable upon sale or other disposition of an asset. . . ."[40] Because the salvage value is fixed at the time of the acquisition of the asset, it should not be changed later—indeed it cannot be changed later—and still conform to the Regulations (except when there is a redetermination of useful life). Therefore, even if the asset should happen to be sold at a price greater than the previously estimated salvage value, the salvage value should not be

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[33]383 U.S. 573 (1966).

[34]215 F. Supp. 356 (D. Conn. 1963).

[35]Fribourg Nav. Co. v. Commissioner, 335 F.2d 15 (2d Cir. 1964).

[36]Fribourg Nav. Co. v. Commissioner, 383 U.S. 573 (1966).

[37]Rev. Rul. 92, 1962-1 Cum. Bull. 29.

[38]Treas. Reg. § 167 (a)-1 (a), (b), (c) (1956).

[39]See S & A Co. v. United States, 218 F. Supp. 677 (D. Minn. 1963), *aff'd*, 338 F.2d 629 (8th Cir. 1964), *cert. denied*, 383 U.S. 942 (1966); Macabe Co., 42 T.C. 1105 (1964); Wyoming Builders v. United States, 227 F. Supp. 534 (D. Wyo. 1964), *aff'd*, 358 F.2d 672 (10th Cir. 1966).

[40]Treas. Reg. § 1.167 (a)-1(c) (1956). (Emphasis added.)

changed to conform to the sale price. As one court has said, "[P]rediction is the very essence of depreciation accounting."[41]

There is another provision in the Regulations which, according to the taxpayers,[42] further strengthens their contention. It reads, "Salvage value shall not be changed at any time after the determination made at the time of acquisition merely because of changes in price levels."[43] The taxpayers generally insist that this would prevent a redetermination of salvage value merely because the sales price, due to an increase or a decrease in the general price level, is not identical with the estimated salvage value. Practical considerations are argued in support of the taxpayer's contention, particularly the difficulties of reflecting such changes on the books each year.[44]

The second of the taxpayers' basic arguments is that in disallowing the year-of-sale depreciation, the government fails to recognize an existing "dichotomy"[45] of tax consequences. The claim is that the government's position mingles the concepts of depreciation as understood (1) in referring to the gradual wearing out of property due to use over the years and (2) in the concept of depreciation/appreciation in value due to a change in general price level. The fact that an asset may sell for more than its depreciated basis is related to a different concept, has different tax consequences,[46] and should not prevent a deduction being taken for the use of the asset in the business.[47] As the *Motorlease* case explains, "The *sale* of the used property is another taxable event to which new and different tax consequences attach."[48]

The third argument used by the taxpayers questions the extent of the *Cohn* decision, which was incorporated into a revenue ruling as authority for disallowing depreciation in the year of sale.[49] This argument was stated succinctly by one court: "It [the *Cohn* decision] does not purport to set up an automatic hindsight re-evaluation which becomes a self-executing redetermination of salvage value triggered by the sale of depreciable assets."[50] Therefore, the *Cohn* decision should not be used in every case to automatically deny a deduction for the year of sale where the sale price is greater than the depreciated basis.

The government's primary argument for disallowing a depreciation deduction for the year in which the asset is sold for more than its

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[41]Massey Motors v. United States, 364 U.S. 92, 105 (1960).

[42]See S & A Co. v. United States, 218 F. Supp. 677 (D. Minn. 1963), *aff'd*, 338 F.2d 629 (8th Cir. 1964), *cert. denied*, 383 U.S. 942 (1966); Wyoming Builders v. United States, 227 F. Supp. 534 (D. Wyo. 1964), *aff'd*, 358 F.2d 672 (10th Cir. 1966); see also Cohn v. United States, 259 F.2d 371 (6th Cir. 1958).

[43]Treas. Reg. § 1.167 (a)-1(c) (1956).

[44]See Cohn v. United States, 259 F.2d 371 (6th Cir. 1958).

[45]Macabe Co., 42 T.C. 1105, 1110 (1964).

[46]Treas. Reg. § 1.167 (a)-8 (a) (1956).

[47]See Macabe Co., 42 T.C. 1105, 1110 (1964).

[48]Motorlease Corp v. United States, 215 F. Supp. 356 359 (D. Conn. 1963). *aff'd*, 383 U.S. 573 (1966).

[49]Rev. Rul. 92, 1962-1 Cum. Bull. 29.

[50]Motorlease Corp. v. United States, 215 F. Supp. 356, 363 (D. Conn. 1963), *aff'd*, 383 U.S. 573 (1966).

depreciated basis is simply that the use of the asset did not cost the taxpayer anything in that year.[51] Therefore, the taxpayer should not be allowed a deduction for this non-existent cost.

Perhaps subsidiary to and combined in this argument is the concept that the sale price is conclusive evidence of the salvage value. The claim is that there can be no more exact measure of the salvage value to be used in computing depreciation than the actual price received for the asset. Therefore, if the sale price is greater than the depreciated basis, no more depreciation can be allowed.[52]

A third argument made by the Commissioner concerns the purpose of the depreciation allowance itself. He contends, and his contention is accepted in at least one court,[53] that, "[The] design [of the depreciation deductions] is to prevent a loss to the taxpayer through the unrecovered cost of depreciable assets, not to provide the taxpayer with a profit over and above that cost." Consequently, the deduction should not be allowed in a year in which the taxpayer shows a gain from the sale of the asset.

It is submitted that in the *Fribourg* case, and in the others allowing the deduction, the courts reached the correct decision. The taxpayer's claim for depreciation seems to have a greater basis in both the Regulations and general depreciation accounting principles and practice than does the Commissioner's contention. Because *Fribourg* was a case of first impression for the United States Supreme Court, and because the decision does seem to be the correct one, it seems probable that the *Fribourg* decision will be followed, and that perhaps a definite rule has been established for an area in which conflict previously ruled.

James Kearney Dossett, Jr.

Torts—Strict Liability of A Manufacturer to A Consumer

In 1916 the Court of Appeals of New York, under the leadership of the celebrated Judge Cardozo, handed down a new theory of tort liability. In *MacPherson v. Buick Motor Co.*[1] the court ruled obsolete the old and confusing requirement of privity between a manufacturer and a consumer, and allowed the injured user of a product to go directly against the source from which the product came.[2] Exactly twelve years later, the Supreme Court of Mississippi was faced with an almost identical

[51]See Macabe Co., 42 T.C. 1105, 1108 (1964); Fribourg Nav. Co. v. Commissioner, 383 U.S. 272 (1966); Wyoming Builders v. United States, 227 F. Supp. 534 (D. Wyo. 1964), *aff'd*, 358 F.2d 672 (10th Cir. 1966).

[52]Cohn v. United States, 259 F.2d 371 (6th Cir. 1958); S & A Co. v. United States, 218 F. Supp. 677 (D. Minn. 1963), *aff'd*, 338 F.2d 629 (8th Cir. 1964), *cert. denied*, 383 U.S. 942 (1966).

[53]Motorlease Corp. v. United States, 334 F.2d 617, 618 (2d Cir. 1964), *rev'd*, 383 U.S. 573 (1966).

[1]217 N.Y. 382, 111 N.E. 1050 (1916).

[2]*Id.* 111 N.E. at 1053.

situation in the case of *Ford Motor Co. v. Myers*.[3] Instead of following the lead of the New York court, the Mississippi court held that privity of contract was required before a consumer of a product could reach the manufacturer. The *MacPherson* decision proved to be the more widely adopted one, and, as Dean Prosser stated in 1964, "is universal law in the United States, with the barely possible but highly unlikely exception of Mississippi."[4]

The Mississippi Supreme Court specifically overruled *Ford Motor Co. v. Myers* and abolished the old requirement of privity in *State Stove Mfg. Co. v. Hodges*,[5] a decision handed down in July 1966. Even more notable, the court adopted the theory of strict liability, a new and fast-growing trend in tort law.[6]

In the *State Stove* case, a pair of contractors installed an electric water heater in a new home in Webster County, Mississippi. The water heater was manufactured in Tennessee, sold to a Tennessee wholesaler, and then sold to the contractors. About eight months after installation, the water heater exploded, destroying the house and the enclosed personal property. Two thermostats installed by the manufacturer had stopped working and the heat rose to such a point that a plastic tube installed by the manufacturer for the insertion of cold water fused. With cold water prevented from entering, the heat continued to mount until the explosion occurred.

The water heater had been installed by a plumber acting as an agent of the contractors. The instructions furnished by the manufacturer directed that a combination pressure and pressure relief valve be installed with the water heater. The warranty stated that the water heater was not warranted unless it "was equipped with a suitable temperature and pressure relief valve." The plumber did not install such a device, although he testified that he knew the instructions directed it. It was undisputed that the explosion would not have occurred if a pressure relief valve had been installed.

The owner of the home brought suit against the manufacturer and the contractors. The lower court dismissed with prejudice the suit against the contractors on the grounds that there was no causal connection between the explosion and the manner in which the heater was installed. However, judgment was rendered against the manufacturer. The manufacturer appealed from the above decree and the home owner appealed from the dismissal as to the contractors.

There was no privity of contract alleged between the manufacturer and the home owner. The Mississippi Supreme Court stated that there was no rational basis for the continuance of the privity requirement. The court then discussed the theory of a manufacturer's liability to a consumer. In setting up strict liability in tort, the court followed the guidelines suggested by section 402A of the American Law Institute's Restatement of Torts (Second), which states:

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[3]151 Miss. 73, 117 So. 362 (1928).

[4]PROSSER, TORTS 661 (3d ed. 1964).

[5]189 So. 2d 113 (Miss. 1966).

[6]*Id.* at 118.

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[7]

This section from the Restatement is now the law in Mississippi "insofar as it applies to a manufacturer of a product and to a contractor who builds and sells a house with a product in it."[8]

In applying the principles of the Restatement to the case at bar, the court found that the water heater was not in an unreasonably dangerous or defective condition when sold by the manufacturer, and that the negligent failure of the contractors to install a pressure relief valve was the "sole proximate cause" of the explosion. The judgment against the manufacturer was reversed, judgment was rendered against the contractors, and the issue of damages was remanded. Four justices joined in a vigorous dissent by Chief Justice Ethridge, who argued that the manufacturer should be held liable so as to shift the responsibility of installing such safety devices from the retailer or consumer to the manufacturer.[9]

A study of the history of products liability in Mississippi reveals that courts allowed recovery in the area of food and drink intended for human consumption without requiring the consumer to show privity with the manufacturer. The first such case, *Jackson Coca-Cola Bottling Co. v. Chapman*,[10] was decided in 1914. The plaintiff had drunk from a bottle occupied by the remains of a "sma' mousie" and became ill. The evidence indicated that the manufacturer had exercised due care in bottling the beverage. However, due care obviously had not been sufficient to prevent the harm. The court, in allowing the plaintiff to recover, ruled that the manufacturer of a beverage was under a legal duty to see that no foreign substance was mixed with the beverage. The court said that the duty extended both to the retailer and to the general public. This decision appears to be based upon an implied promise by the manufacturer that the beverage was safe, and upon public interest in protecting the innocent consumer.

The Mississippi Supreme Court authored a new theory in 1927 which gained wide acceptance throughout the nation. In the case of

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[7] *Id.* at 118.

[8] *Id.* at 118.

[9] *Id.* at 126.

[10] 106 Miss. 864, 64 So. 791 (1914).

Coca-Cola Bottling Works v. Lyons[11] the plaintiff was given a Coca-Cola by a companion. Upon drinking it, the plaintiff received severe injuries from broken glass in the bottle. The evidence indicated that the manufacturer was not negligent. No contractual relationship existed between the plaintiff and the manufacturer or retailer, since the drink was a gift. The court held that the manufacturer had given an implied warranty that his product was safe for human consumption, that the warranty ran with the product, and that it carried over to the consumer without the necessity of privity. Since the implied warranty existed, and since the warranty was breached, all that the plaintiff was required to do was to prove damage as a result of consuming the glass. In this manner the Mississippi court circumvented the privity barrier and found for the consumer despite lack of negligence on the part of the manufacturer in food and drink cases.

Although Mississippi refused to extend strict liability based on warranty beyond articles intended for human consumption,[12] the concept has been expanded in other jurisdictions. Animal food,[13] a defective hair preparation,[14] and defective bricks[15] have been held to be covered by a manufacturer's implied warranty. Strict liability in warranty was expanded to almost unlimted lengths in the landmark case of *Henningsen v. Bloomfield Motors, Inc.*[16] In this case the husband purchased a new automobile. His wife was injured while driving the car, and sued both the manufacturer and the retailer. The Supreme Court of New Jersey held that lack of privity would not bar a suit by the husband and wife as co-plaintiffs against the retailer and the manufacturer under an implied warranty of merchantability. This decision is particularly important because it allows a consumer other than the purchaser to recover, and because the recovery was allowed under an implied warranty rather than an expressed warranty created by advertising.

Recovery under an implied warranty and under strict liability in tort are similar in that an injured consumer can go directly against the manufacturer without the necessity of privity, and can recover without proving negligence on the part of the manufacturer. However, certain problems can arise in warranty cases that hopefully will not be present in cases decided under the theory of strict liability in tort. Since an implied warranty runs with the goods, anything that invalidates the sale at any point in the passage of the goods from the manufacturer to the consumer can destroy the contract and defeat the warranty. The Mississippi Supreme Court was faced with this problem in the case of *Grapico Bottling Co. v. Ennis*.[17] A state statute prohibited the sale of merchandise on Sunday. The consumer purchased a bottled drink on

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[11]145 Miss. 876, 111 So. 305 (1927).

[12]E.I. DuPont de Nemours & Co. v. Ladner, 221 Miss. 378, 73 So. 2d 249 (1954).

[13]McAfee v. Cargill, Inc., 121 F. Supp. 5 (S.D. Cal. 1954).

[14]Graham v. Bottenfield's, Inc. 176 Kan. 68, 269 P.2d 413 (1954).

[15]Spence v. Three Rivers Builders & Masonry Supply, Inc., 353 Mich. 120, 90 N.W.2d 873 (1958).

[16]32 N.J. 358, 161 A.2d 69 (1960).

[17]140 Miss. 502, 106 So. 97 (1925).

that day. The contents were harmful to the plaintiff, but recovery was denied because the contract of sale was voided.

The use of a disclaimer can also present problems under warranty. A seller can often escape liability by the use of a disclaimer.[18] Although a disclaimer may serve a useful purpose in contracts between knowledgeable parties in equal bargaining positions, it is unfair to allow a manufacturer to escape liability to the average consumer by stencilling "This product is not warranted in any way" on the product, or by adding such a phrase to the sales contract. When confronted with this problem, the courts have been able to correct some of the situations by holding that the buyer was not made aware of the disclaimer,[19] or by refusing to enforce the disclaimer on the grounds of public safety.[20]

Often the period of time allowed in which an action for breach of warranty may be brought is shorter than the period in which a tort action may be brought.[21] A consumer, unaware of his legal rights, may be prevented from collecting damages for failing to file suit within the time permitted.

Various reasons have been given for imposing strict liability upon a manufacturer despite lack of negligence.[22] Probably the most important reason is a desire to shift the burden of inevitable accidents to manufacturers who are supposedly in a better position to sustain the loss than is the average consumer. Also, the manufacturer is able to pass on the cost of these accidents to the consuming public as a whole. It is felt that the manufacturer, by putting his product upon the market, has assumed a special responsibility to the consuming public, and that imposing this duty upon the manufacturer will motivate him to produce a safer product.

The *State Stove* decision does not require a manufacturer to produce a completely safe product.[23] Section 402A of the Restatement of Torts (Second) requires that a product be defective and "unreasonably dangerous" in order to be covered by the section. The court relies heavily on an article by Dean Wade[24] in defining the limits of a manufacturer's liability.[25] Dean Wade suggests that the test to apply is whether the defendant would be acting unreasonably if he placed the product on the market while knowing of its defective condition. Factors to be considered in resolving this problem include:

> (1) the usefulness and desirability of the product, (2) the availability of other and safer products to meet the same need,

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[18]Hayssen Co. So. v. Donelson & Poston, Inc., 51 Tenn. App. 57, 364 S.W.2d 489 (1962).

[19]India Paint & Lacquer Co. v. United Steel Prods. Corp., 123 Cal. App. 2d 597, 267 P.2d 408 (1954).

[20]Linn v. Radio Center Delicatessen, Inc., 169 Misc. 879, 9 N.Y.S.2d 110 (1939).

[21]Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897 (1962).

[22]Prosser, *The Assault upon the Citadel*, 69 YALE L.J. 1099, 1114-24 (1960).

[23]State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 120-22 (Miss. 1966).

[24]A.B., LL.B., University of Mississippi; LL.M., S.J.D., Harvard; Dean, Vanderbilt University School of Law.

[25]Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5 (1965).

> (3) the likelihood of injury and its probable seriousness, (4) the obviousness of the danger, (5) common knowledge and normal public expectation of the danger (particularly for established products), (6) the avoidability of injury by care in use of the product (including the effect of instructions or warnings), and (7) the ability to eliminate the danger without seriously impairing the usefulness of the product or making it unduly expensive.[26]

Thus it is a question of fact as to whether an article is reasonably safe. The question is to be decided by using "a flexible standard responsive to the facts of each case."[27]

While the plaintiff does not have to prove negligence on the part of the manufacturer in order to recover, certain conduct on the part of the plaintiff can constitute a valid defense. Comment *n* to section 402A of the Restatement of Torts (Second) suggests that contributory negligence is not a defense available when the negligence consists of a failure to discover the defect in the product, or to guard against the possibility of a defect existing. However, if the plaintiff voluntarily and knowingly continues to expose himself to the danger, the Restatement suggests that recovery be denied. Contributory negligence does not bar recovery in Mississippi.[28] The Mississippi Supreme Court has held that a warranty did not apply in a food and drink case when the consumer used the product although knowing of the defect.[29] It is submitted that this distinction drawn by the court probably will carry over into strict liability in tort.

Section 402A of the Restatement states that liability extends to any seller of a product. The *State Stove* decision expressly limits the application of strict liability in tort to manufacturers and to contractors who build and sell houses containing the defective product.[30] Other states have extended strict liability to sellers who were not manufacturers of the defective product.[31] The major reason for imposing strict liability upon the manufacturer applies equally well to wholesalers and retailers: they are as a class more able than the average consumer to absorb the costs of an inevitable accident and are in a position to pass on the loss to the consuming public in the form of operating costs.

However, the question remains unsettled as to whether the Mississippi Supreme Court is ready to apply the theory of strict liability in tort to classes other than manufacturers. The Mississippi Supreme Court refused to hold liable under an implied warranty the retailer of a defective can of food,[32] but allowed recovery against a wholesaler who sold

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[26]*Id.* at 17.

[27]State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 121 (Miss. 1966).

[28]Miss. Code Ann. § 1454 (1956).

[29]Missouri Bag. Co. v. Chemical Delinting Co., 214 Miss. 13, 58 So. 2d 71 (1952).

[30]State Stove Mfg. Co. v. Hodges, 189 So. 2d 113, 118 (Miss. 1966).

[31]Vandermark v. Ford Motor Co., 61 Cal. 2d 256, 391 P.2d 168 (1964).

[32]Kroger Grocery Co. v. Lewelling, 165 Miss. 71, 145 So. 726 (1933).

the product under the wholesaler's brand as his own product.[33]

It is difficult to assess the effects of the *State Stove* decision. The Mississippi Supreme Court indicated in previous decisions that the privity requirement might be overruled whenever a suitable opportunity arose.[34] The federal courts assumed that Mississippi would eliminate the requirement of privity whenever the issue came before the state's highest court.[35] Thus, the lack of privity between the manufacturer and the consumer was not a very secure foundation upon which to base a defense. However, the old requirement probably gave the manufacturer more bargaining power in pre-trial negotiations than he will have under the strict liability theory.

The decision to eliminate the requirement of privity should not have come as a surprise to any lawyer. The only surprising thing about the decision is the adoption of strict liability in tort rather than the expansion of the old warranty concept pioneered by Mississippi. It is submitted that the court made a wise decision in adopting the less complex theory of strict liability in tort.

S. Wayne Easterling

Usury—An Analysis of Usury Legislation and the Mississippi Corporate Exception Statute

I. History

"Have your cake and eat it, too; loan it out at interest."[1] The regulation of interest-bearing loans has posed a problem since some enterprising tradesman discovered that he could make his money work for him. Originally all interest was usury; the term applied to any interest received for the use of property. Profit thereby incurred was condemned by no lesser authorities than the Bible[2] and Aristotle.[3] Jews were forbidden to charge interest on a loan to a brother Jew,[4] although no sin was involved in receiving interest from a stranger.[5] The Greeks, Aristotle notwithstanding, had no qualms about allowing the lender a fair return[6] on his investment, and interest-bearing loans were quite common in Greek commercial ventures.[7]

The early leaders of the Christian Church, influenced by the teach-

[33]Swift & Co. v. Hawkins, 174 Miss. 253, 164 So. 231 (1935).

[34]Harrist v. Spencer-Harris Tool Co., 244 Miss. 84, 140 So. 2d 558 (1962).

[35]Necaise v. Chrysler Corp., 335 F.2d 562, 568-73 (5th Cir. 1964).

[1]Anon.

[2]*Exodus* 22:25-27; *Leviticus* 25:35-37; *Deuteronomy* 23:19-20.

[3]Politics, bk. 1, ch. 10, 4, 5.

[4]*Deuteronomy* 23:19.

[5]*Deuteronomy* 23:20.

[6]"Let usurer's interest money be moderate." Potter, Antiquities of Greece 150, as quoted in Ryan, Usury and Usury Laws 40 (1924).

[7]See Ryan, Usury and Usury Laws 40-41 (1924).

ings of the Old Testament, quite naturally regarded the taking of interest as sinful.[8] This unanimity of early opinion lasted nearly 1500 years and curiously coincided with the Dark Ages—a period when commerce sank to its lowest level. The Aristotelian concept of money as barren, useful only as a medium of exchange, was the generally accepted doctrine.[9] Finally, near the end of the fifteenth century, the rising importance of commerce and the realization that money was a useful tool with inherent value signaled the end of the absolute prohibition of interest. In 1545 the Statute of Henry VIII[10] abolished the prohibition of interest and established a maximum legal rate of ten per cent per annum. This statute served not only as a basis for subsequent English legislation, but also as the model for many present usury statutes in the United States.[11] England abolished its usury statutes in 1854[12] and evolved a system of judicial restraint of usury,[13] while in the United States, changes in the usury statutes generally have been limited to the enactment of exceptions to original usury statutes based on the 1545 English law.[14]

Two justifications have been advanced for the existence of usury laws; a desire to fix the price of money and the need to protect the necessitous or ignorant borrower from oppressive bargains forced on him by greedy money-lenders. However, the typical usury statute has failed miserably to accomplish either objective. The following analysis presents some basic evidence of the lack of success of usury laws.

First, in the period from 1870 to 1920, the yearly interest rate on commercial paper in the United States fluctuated between four and one-half per cent and twenty-four per cent.[15] The yearly rate was above ten per cent in seven different years, above eight per cent in nineteen different years, and above seven per cent in thirty different years.[16] These observations strongly suggest that the usury laws are obeyed only when the maximum legal rate happens to be greater than the current market rate of interest.

Second, the laws have been easily evaded and avoided[17] as illustrated by the large number of well-documented methods of escaping their effects.[18]

Third, the passage of remedial legislation such as the corporate

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[8]Bernstein, *Background of a Gray Area in Law: The Checkered Career of Usury*, 51 A.B.A.J. 846 (1965).

[9]SAMUELSON, ECONOMICS 583 (6th ed. 1964).

[10]37 Hen. 8, c. 9 (1545).

[11]See, *e.g.*, N.J. STAT. ANN. § 31:1-1, 3 (1963).

[12]17-18 Vict., c. 90 (1854).

[13]Moneylenders Act, 1900, 63 & 64 Vict., c. 51; Moneylenders Act, 1927, 17 & 18 Geo. 5, C. 21.

[14]See, *e.g.*, N.Y. GEN. OBLIGATIONS LAW § 5-521; N.Y. PEN. LAW § 2401 (Supp. 1966).

[15]RYAN, USURY AND USURY LAWS 116-17 (1924).

[16]*Ibid.*

[17]For a distinction see Anglin v. Nasif, 217 La. 392, 46 So. 2d 309, 311 (1950).

[18]See generally Comment, *Evasion and Avoidance of Florida Usury Laws*, 5 MIAMI L.Q. 493 (1951).

exception, small loan acts, homeowner corporation statutes, and statutes imposing criminal sanctions on usury are indicative of a problem area in the law. The very existence of these correctional statutes constitutes graphic testimony to the ineffectiveness of the typical usury statute.

Fourth, usury statutes have been extensively criticized from the time of Turgot and Bentham[19] to the present.

The mass of evidence showing the general failure of usury laws compels an examination of the basic objectives of these laws in the light of modern economic theory to determine the reasons for their failure and to help postulate a new regulatory scheme scientifically designed to achieve its objective.

II. Economic Theory

Essentially, usury statutes seek to regulate the cost of loans. Since the cost of money is expressed as an annual percentage of the loan and called interest, the usury laws regulate the cost by limiting the rate of interest which may be charged. Interest is defined as "the price of loanable funds."[20] However, the interest rate is never the sole cost and often it is not the major cost of a loan. A loan's cost consists of interest, overhead, and compensation for risk.[21] Thus the true interest rate is the rate of return on a virtually riskless investment such as a United States Government bond.

Interest is defined as a price, and as in the case of any other price, the interest rate is determined by the interaction of supply and demand factors operating in the economy.[22] The generally accepted theory considers the interest rate to be established at the equilibrium position of the supply of loanable funds and the demand for capital.[23]

The businessman employs capital as a production tool in much the same manner as he uses a lathe or a drill press, and the interest he pays for the use of capital is analagous to the cost of other capital equipment. Capital is valuable to an entrepreneur, for with it he can purchase products and innovations which promise the return of an amount greater than that expended. If the expected return on a proposed business venture exceeds the cost of the necessary capital (interest), the businessman seeks to borrow the required capital. His desire for capital is directly proportional to the difference between the expected return and the cost of borrowing. At a low rate of interest a large number of business ventures can profitably borrow the necessary money, and the demand for loanable funds is high. Conversely, at a high rate of interest only the relatively few business ventures with an expected rate of return higher than the interest rate can justifiably borrow the needed capital, and the demand for loanable funds is low.

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[19]Turgot and Bentham each wrote brilliantly persuasive defenses of usury in eighteenth-century France and England respectively. Each contributed to the ultimate repeal of usury laws in his country.

[20]Bach, Economics 542 (4th ed. 1963).

[21]*Ibid.*

[22]*Ibid.*

[23]Samuelson, Economics 582 (6th ed. 1964).

Thus the demand for loanable capital varies inversely with the interest rate.

Consumer loans, or loans made to individuals to purchase non-production items, are less sensitive to the interest rate than production loans.[24] The consumer usually is motivated by need, not by the desire to make a profit. Therefore, he is forced to accept whatever interest rate is offered him. However, the volume of consumer loans is insignificant compared to the value of production loans and exerts no great effect on the determination of the interest rate.[25]

Early economists attached primary importance to this effect of the productivity of capital (demand) as the determinative factor in establishing the interest rate.[26] Later economists contended that the size and composition of the supply of loanable funds was the determinative factor.[27] The latter school reasoned in the following manner: the size of the supply of loanable funds will determine how many of the potential business ventures will be undertaken. If the supply of loanable funds is high, then many projects can be implemented and the interest rate will be low; if, however, the supply of funds is low, then only the ventures promising high rates of return will be financed and the interest rate will be high. Therefore the rate of interest ultimately depends on the supply of loanable funds.

The potential sources of the supply of loanable funds are individual savings, business savings, and money created by policies of the banking system.[28] Basically, saving or investing involves an exchange of present goods for the promise of future goods. Thus a lender balances his impatience to enjoy his present goods against the expectation of receiving goods of greater value in the future. The willingness of an investor to defer present enjoyment depends on the size of his income, its probability, its expected distribution in time, and his personal psychological characteristics.[29] The smaller the income of an investor, the less likely he is to invest it, since he is more likely to be preoccupied with his own personal needs. The less probable the continued existence of income becomes, the more willing is the individual to invest his money in order to protect himself against future loss. Similarly, a potential investor's willingness to invest varies inversely with the length of time he expects to receive his income. Finally, the importance of personal characteristics of the potential lender, such as foresight, self-control, life expectancy, thrift, prudence, and concern for the future welfare of others is obvious in the determination of the lender's inclination to invest. However, the effect of the psychological outlook of the collective body of potential investors is not so obvious. John Maynard Keynes, probably the most influential economist of the twentieth century, has stated that the rate of interest is a highly psychological phe-

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[24]McConnell, Economics 566 (2d ed. 1963).

[25]Meth, *A Contemporary Crisis: The Problem of Usury in the United States*, 44 A.B.A.J. 637-38 (1958).

[26]Walker, Political Economy 243-44 (1889).

[27]Fisher, The Theory of Interest 71, 80 (1930).

[28]McConnell, Economics 565 (2d ed. 1963).

[29]Fisher, The Theory of Interest 71, 80 (1930).

nomenom.[30] Public opinion concerning the state of the economy, the soundness of government policy, and the current level of the interest rate can have a marked effect on the willingness of potential lenders to invest their money.[31] The effect of all these factors is to establish some net willingness to invest on the part of each potential investor.[32] If the composite willingness to invest is high, the supply of loanable funds will be high and the interest rate will be low. On the other hand, if the willingness to invest is low, the supply of loanable funds will be low and the interest rate will be high. The desire to invest will increase with the interest rate, but since the interest rate is only one of a number of factors that influence the willingness to invest, its effect will not be as pronounced as the effect on the demand side of the market.

The modern theory of interest determination, encompassing both of the earlier theories, states that the interest rate is the result of the interaction of both consumer impatience (supply of loanable funds) and the productivity of capital (demand). The rate of interest is fixed at the equilibrium point of the supply of loanable funds and the demand for capital. At a high rate of interest, the number of business ventures that can justifiably borrow money is small, thus the demand for capital decreases. On the supply side of the market, when the interest rate is high many investors desire to invest their money, thus the supply of loanable funds is also high; but as the interest rate falls, the supply of loanable funds decreases. Finally at some intermediate point the demand for capital equals the supply of loanable funds, and the interest rate at that point is the market-determined equilibrium rate of interest.[33]

III. Analysis of Existing Usury Statutes

With this theoretical background in mind, examination of various usury statutes may disclose the reasons for their failure. Usury legislation has failed to achieve its objective primarily because it is not directed at the evil sought to be eliminated. There are two basic types of usury: legal usury and moral usury.[34] Legal usury is the taking of interest in excess of that permitted by law; it is usury only because the law so designates it.[35] Moral usury is the exaction of an excessive rate of interest because of the unequal bargaining power of the lender and the

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[30] KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY 202 (1935).

[31] *Id.* at 202, 203.

[32] As far as each individual investor is concerned, the rate of interest is fixed, and he adjusts his willingness to invest to the interest rate. However, for the market as a whole the adjustment is reversed, and the interest rate conforms to the net willingness of the borrowers as a group. See FISHER, THE THEORY OF INTEREST 119-20 (1930).

[33] Although this is not completely true, for the purposes of this simplified treatment it is adequate. For a more advanced discussion see SCHUMPETER, I BUSINESS CYCLES 87-129 (1939); BACH, ECONOMICS 545 (4th ed. 1963).

[34] RYAN, USURY AND USURY LAWS xii (1924).

[35] *Ibid.*

borrower resulting from the ignorance or need of the borrower;[36] it is this type of usury that the statutes have tried to prevent.

Although the justification for the latter objective is primarily sociological rather than economic, it must be implemented through regulation of the economic processes. Laudable as this intention is, to believe that an arbitrary and artificial limitation of the interest rate applicable to all loans will effect anything but economic mischief is utterly unrealistic. The futility of attempting to set a maximum interest rate has been recognized by economists for nearly two hundred years.[37] The recorded fluctuations of the interest rate[38] and the numerous methods of escaping the usury laws[39] furnish vivid proof of the ineffectiveness of such price fixing. The interest rate is the resultant of powerful forces operating in the economy which obviously cannot be controlled by legislative enactment.

Since moral usury is caused by the unequal bargaining power of borrower and lender, a usury statute should seek to regulate only loans in which such inequities are likely to occur. Economic theory recognizes two basic types of loans: consumer loans and production loans. Since production loans are generally undertaken only if economically justifiable and are usually made between parties with equivalent bargaining power, the freedom to contract as the business judgment of the parties dictates should not be abridged arbitrarily by a usury statute. The field of consumer loans is the area in which serious disparity of bargaining power is most likely to occur. Therefore, usury legislation should be limited strictly to consumer loans. A law imposing a single maximum, even if applicable only to consumer loans, is also unrealistic, for there are many types of consumer loans, each with a different cost. If the lender is to be allowed a fair return on his investment, and the borrower is to be protected, then the usury statute must provide a degree of flexibility that will enable loans of various costs to be subjected to appropriate regulation.

In addition to achieving efficient regulation of relevant areas, a usury statute should not create economic mischief. The typical usury law, besides being ineffective, has generated some severe side effects whose consequences have been minimized only by the ease of evading the statute. In its role as the price of money, the interest rate functions as a rationing device to assign the supply of capital to the most promising business ventures. If the interest rate were artificially low, the supply of loanable funds would drop, and many worthwhile business ventures would fail for lack of capital, thus hindering the growth of the economy, encouraging an increase in unemployment, and contributing to a rise in prices. By forcing lenders to use roundabout and sometimes illegal methods, the statute increases the cost of a loan and acts as an annoyance to the free flow of commerce. Finally, the typical usury statute generates

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[36] *Ibid.*

[37] See, BENTHAM, IN DEFENSE OF USURY (1787); TURGOT, LES PRETS d'ARGENT (1775).

[38] See, RYAN, USURY AND USURY LAWS 116-17 (1924).

[39] See generally Comment, *Evasion and Avoidance of Florida Usury Laws*, 5 MIAMI L.Q. 493 (1951).

a particularly vicious side effect concerning consumer loans. The low legal rate of interest does not permit a reputable lender to earn a profit on any but secured consumer loans, thereby forcing the needy or inexperienced borrower to turn to an unscrupulous loan shark or even to a criminal syndicate[40] for aid. Thus the average usury law is largely self-defeating—encouraging the very practice it seeks to prevent.[41]

The foregoing discussion is not intended as a case for repeal of all usury laws, for some form of regulation is needed. Rather, it is intended to illustrate the reasons for the failure of the present type of law and to suggest criteria for a better usury statute. An effective usury statute should exempt production loans from its coverage; consumer loans should be regulated under a flexible arrangement that will allow reputable lenders to make a reasonable profit on high risk small loans and yet protect other borrowers from the imposition of excessive rates; and the statute should be free from damaging economic side effects.

IV. Evaluation of Proposed Changes

There are several regulatory schemes in use in the United States and in other countries that merit examination. The first of these is the English system of regulation based on judicial restraint. Under this system there is no maximum interest rate on any loan. The courts, however, have power to declare any transaction usurious and to decree a reasonable arrangement for the parties. The English statute[42] provides that interest in excess of forty-eight per cent per annum shall be presumed excessive unless proved otherwise. The statute in effect designates forty-eight per cent as the pivot point for the burden of proof of the reasonableness of the interest rate. Some authorities have suggested the adoption of a law based on the English system,[43] but although this system has the advantages of flexibility and non-interference with production loans, it has several disadvantages. It does not recognize the differences in the costs of making various loans; the regulation of loans for the needy factory worker is the same as that for the wealthy spendthrift and the speculative businessman. The system has no set guidelines concerning allowable interest rates, and the reasonableness of the loan depends upon the opinion of the judge in the individual case.[44] Such a system fosters uncertainty and ignorance surrounding the law.

Another method of regulation is the passage of laws pertaining only to small loans. These small loan statutes, modeled after the Uniform Small Loans Act, have proven to be very effective in the regulation of

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[40]See Note, *Syndicate Loan Activities and New York's Usury Statute,* 66 COLUM. L. REV. 167 (1966).

[41]For a discussion of the problem in Mississippi before enactment of a small loans law, see Mississippi Economic Council, *Usury in Mississippi* (1956).

[42]Moneylenders Act, 1927, 17-18 Geo. 5, c. 21.

[43]See Note, *An Ounce of Discretion for a Pound of Flesh: A Suggested Reform of Usury Laws,* 65 YALE L.J. 105 (1955); Meth, *A Contemporary Crisis: The Problem of Usury in the United States,* 44 A.B.A.J. 637 (1958).

[44]ORCHARD & MAY, MONEYLENDING IN GREAT BRITAIN 156-57 (1933).

small, unsecured consumer loans.[45] These acts generally provide a schedule of allowable charges, establish a maximum loan value, and create an administrative agency to closely supervise the practices of small loan agencies. These statutes recognize the difference in costs of various loans; they permit a flexible lending arrangement; and, although they are theoretically a form of price-fixing legislation, they generate no mischievous side effects since they operate only in the field of small consumer loans.

Unfortunately, when small loan legislation is enacted, the existing usury laws are left unchanged, and the problem of damaging economic side effects is only partially solved. One attempt to solve this problem is the corporate exception statute, which denies the defense of usury to a corporation. Since corporations are the primary vehicle of industry and commerce, they hold nearly all the production loan capacity in the United States. Therefore, the corporate exception statute effectively frees production loans from the confinement of the usury statute. A combination of the Uniform Small Loans Act and the corporate exception would provide effective and flexible regulation of small consumer loans while production loans would be free from the damaging effects of the usury statute. A closer examination will show whether the corporate exception produces any undesirable side effects.

The first corporate exception statute in the United States was enacted in New York in 1850[46] as a result of the indignation aroused by the holding in the case of *Dry Dock Bank v. American Life Ins. & Trust Co.*[47] The Dry Dock Bank, while in financial difficulty, borrowed money from a London financier through the trust company at an interest rate of six per cent per annum plus a reservation of four per cent of the principal. The bank refused to repay the loan on the grounds that it was usurious, and the New York Court of Appeals declared the obligation void. This holding aroused a storm of protest and directly resulted in the removal of the right of a corporation to the defense of usury.

The exception of corporations from the usury statute may be justified on two broad grounds. First, the corporation does not need the protection of the usury statute. Corporations are generally under no gross inequality of bargaining position, the corporation's liability is limited to the amount invested by its stockholders, and since the corporation is an artificial creation of statute organized for profit, it cannot be forced to borrow to satisfy personal needs. The judicial acceptance of this view is well stated by the Supreme Court of Maryland:

> The usury laws therefore proceed upon the theory that a usurious loan is attributable to such an inequality in the relations of the lender and borrower that the borrower's necessities deprived him of freedom in contracting and placed him at the mercy of the lender . . . . A corporation, on the contrary, is not

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[45]See Hubachek, *Progress and Problems in Regulation of Consumer Credit*, 19 LAW & CONTEMP. PROB. 4 (1954).

[46]N.Y. GEN. OBLIGATIONS LAW § 5-521.

[47]3 N.Y. 344 (1850).

> a natural person, but an artificial legal entity, which intervenes between the lender and the persons who own its stock. . . . It is organized for commercial or other purposes . . . . It has no sensations and cannot be coerced by its necessities into any legal obligations beyond its defined and limited corporate powers. It is primarily a creature of the law under which capital concentrates for business and other gainful ends in an amount judged sufficient for the particular undertaking, and with the knowledge that what has been contributed in the form of capital is the usual measure and limit of the loss of the corporate membership.
>
> The individual borrows from a need springing from his own personal necessities, but the corporation becomes a borrower from a corporate exigency . . . . [T]he loss of the individual, singly or jointly, through usury, is at once both personal and immediate, but that of a corporation may or may not result in ultimate loss to its fluctuating membership, and therefore, while the corporate loss is immediate to the corporation, it is both mediate and proportional among the corporate membership.[48]

Second, the corporate exception restores the natural operation of supply and demand factors in the economy by enabling production loans to escape the restraint of the usury statute. The corporate exception has immediate significance in the local economy for it permits the rationing effect of the interest rate to determine which business ventures shall be undertaken. Freedom of contract is permitted and encouraged; capital can move freely to attractive investment opportunities; and businesses are spared the annoyance and expense of obtaining capital either from states with more favorable economic policies or locally by evasion of the usury statutes. The exception encourages respect for the law and reduces the cost of loans by removing the risk of having a usurious loan voided.

However, the corporate exception statute also contains some inherent disadvantages. Although the exception is favorable to large corporations possessing the bargaining power and resources to command reasonable interest rates, the small single owner or family corporation often must pay unfair rates when the protection of the usury statute is removed. Another drawback is that the corporate exception can be used to cloak a usurious loan to an individual by requiring him to incorporate and to receive the loan through the sham corporation, thus nullifying the protection of the small loan acts and the general usury statute.

A regulatory system employing the corporate exception should include safeguards to protect the small corporation and to prevent the use of a sham corporation to evade the other usury statute; yet, it should preserve the natural freedom of the economic market. One

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[48]Carozza v. Federal Fin. & Credit Co., 149 Md. 223, 249, 250, 131 Atl. 332, 342 (1925).

attempted solution involves the enactment of piecemeal *ad hoc* legislation to correct inequitable practices as they arise.[49] Although this may solve the immediate problem, it cannot be completely effective as the evil is not attacked at its source. Another disadvantage of the *ad hoc* method is that a considerable time lag usually ensues between the development of an opprobrious practice and the passage of remedial legislation, during which the public is completely unprotected. Another possible solution involves judicial determination of the reasonableness of each case. There is authority for the proposition that courts may set aside an otherwise usurious transaction on the grounds that it is unjust and oppressive.[50] Such a system, however, would be slow, uncertain, and sporadic and would involve, in some cases, strained interpretations of the law in order to achieve an equitable result. A much better alternative would be the use of a modified corporate exception statute.

The modifications of the basic corporate exception statute include the provision of a maximum interest rate, a minimum loan limit, and a clause specifically prohibiting the use of corporate shams. The purpose of the maximum interest rate is to protect the small corporation by providing some limit to the rate of interest that may be charged. The minimum loan provision seeks to exclude from the statute the smaller loans usually made to the small corporation. The ceiling interest rate must be carefully selected so that it is low enough to provide some protection to the small corporation and yet high enough to prevent interference with the market determination of the interest rate. The minimum loan limit should be so low that it will not seriously interfere with the issuance of production loans, but it should be high enough to provide a measure of protection to the necessitous corporate borrower. These modifications provide a degree of protection to the small corporation without unduly restricting its right to borrow freely. The economic side effects of the modifications are minimal since most production loans are greater than the minimum loan limit, and the maximum interest rate is set much higher than the market rate of interest. A complete solution to the problem of the small corporation is not possible since it would require that small corporations "have their cake and eat it too." This statute should be quite a satisfactory compromise.

V. The Mississippi Corporate Exception Statute

The Mississippi usury law was amended in June, 1966, to include a modified corporate exception statute.[51] The amendment leaves unchanged the legal rate applicable to individuals at eight per cent and the forfeiture of principal and interest provision at twenty per cent. In summary the amendment provides that

> [A]ny domestic or foreign *corporation organized for profit* may agree to pay any rate of interest . . . not to exceed fifteen per-centum per annum on any contract or other obligation under

[49]See N.Y. GEN. OBLIGATIONS LAW § 5-521; N.Y. PEN. LAW § 2401.

[50]*In re* Chicago Reed & Furn. Co., 7 F.2d 885 (7th Cir. 1925).

[51]MISS. CODE ANN. § 36 (1956) as amended by Senate Bill no. 1782 (1966).

> which the *principal balance to be repaid shall originally exceed twenty five hundred dollars* . . . and, as to any such agreement, *the defense or claim of usury by any such corporation, its successors, guarantors, or assigns or anyone on its behalf is prohibited.*[52]

An insight into the effect the legislature intended this statute to accomplish greatly aids in the interpretation and construction of the act. The primary purpose of the statute is stated in its title as "An Act to encourage commerce and industry . . . ." Further clarification of the intent of the amendment is given by the author:

> This bill was necessary for three main and compelling reasons.
>
> (1) To enable Mississippi to compete with other states for new industry.
>
> (2) To enable Mississippi business and industry to compete in the national money market for the financing essential to their growth and development and to the development of a balanced economy in the state.
>
> (3) To permit the Mississippi financial community to provide a broad range of financing services to business and industry in the state at rates which reflect the services, costs and risks involved in particular transactions.[53]

A memorandum in support of the bill, circulated among members of the legislature, presented the economic arguments in favor of removing the restrictions on corporate borrowing. It stressed that the amendment was intended to encourage commerce and industry and gave assurance that it would not weaken existing consumer loan protection.[54] The provisions of the law itself clearly indicate its purpose. The fact that existing interest rates applicable to individuals were not changed, the inclusion of a minimum loan standard, and the requirement that a corporation be organized for profit to qualify for the exception show that the amendment was designed to promote economic growth while providing a maximum of protection to consumer loans.

The statute itself is clearly written and there are few areas requiring deep examination to discover their motivational intent. The first question of interpretation concerns the qualification for application of the statute, that is, the meaning of the phrase "organized for profit." The intended effect, according to the author, is to exclude charitable and non-profit corporations.[55] This is evident from a consideration of the purpose of the act, since charitable and non-profit corporations are not engaged in competition and are thus unlikely to require production loans. However, since statements and opinions of legislators are not competent

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[52]*Ibid.* (Emphasis added.)

[53]Letter from Sen. J. P. Dean to R. M. Conner, Oct. 22, 1966.

[54]*Memorandum in Support of the Removal of Restrictions on Corporate Borrowing* 3 (1966).

[55]Letter from Sen. J. P. Dean to R. M. Conner, Oct. 22, 1966.

aids to the court in ascertaining the meaning of an act,[56] the court very easily could extend the meaning of the phrase to exclude from the statute sham corporations organized solely to evade the usury statute applicable to individuals. Theoretically, as the corporate exception statute now stands, a lender may refuse to loan money to an individual at legal interest rates, but may agree instead to make the loan at a usurious rate if the individual forms a sham corporation and signs the corporate note as surety.

This practice was not permitted in the earlier cases,[57] but later cases have held that since both parties deal with each other with the usury statutes before their eyes, the defense of usury may not be asserted by a corporation, even though it was organized solely for the purpose of receiving the loan.[58] This view is taken principally by New York[59] and more recently by Florida.[60] Most other states hold that if the loan is made in fact to an individual, although in form to a corporation to avoid the usury law, the defense of usury may be asserted;[61] but if the loan is actually made to the corporation, the defense of usury is not available.[62] This view results in some rather arbitrary and meaningless distinctions.[63] In practice it has proved difficult to establish that a loan was made in fact to an individual, and therefore the protection of the general usury laws of these states has been, to some extent, nullified. The expressed intention of the Mississippi legislature is to encourage industry and commerce and not to promote the evasion and consequent nullification of the state usury laws. The Mississippi Supreme Court has on numerous occasions stated that it will look through the form to the substance to determine whether a contract is usurious.[64] "A contract for usurious interest is a corrupt contract, and is violative of the public policy of this state. The courts, in order to ascertain whether the contract is usurious, will look through the form to the substance; the real facts will control."[65] In view of the intent of the legislature to exclude from the operation of the statute all but bona fide corporations organized for profit, the undesirable effects of allowing the perversion of corporate shams, and the Mississippi Supreme Court's explicit social policy concerning usury, evasion of the usury laws by means of a corporate veil probably will not be permitted.

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[56]Woollcott v. Shubert, 217 N.Y. 212, 111 N.E. 829 (1916).

[57]See First Nat'l Bank v. American Near East & Black Sea Line, Inc., 119 Misc. 650, 197 N.Y.S. 856 (Sup. Ct. 1922).

[58]Jenkins v. Moyse, 254 N.Y. 319, 172 N.E. 521 (1930).

[59]*Ibid.*

[60]Holland v. Gross, 89 So. 2d 255 (Fla. 1956).

[61]*E.g.*, *In re* Greenberg, 21 N.J. 213, 121 A.2d 520 (1956).

[62]*E.g.*, Corradini v. V. & M. Holding Corp., 34 N.J. Super. 427, 112 A.2d 603 (1955).

[63]See Comment, *Usury Inc.—Incorporation to Avoid Usury Laws*, 7 MIAMI L.Q. 375 (1953).

[64]*E.g.*, Richardson v. Cortner, 232 Miss. 885, 100 So. 2d 855 (1958).

[65]Kennedy v. Porter, 176 Miss. 742, 748, 170 So. 286, 287 (1936).

[66]MISS. CODE ANN. § 36 (1956) as amended by Senate Bill no. 1782 (1966).

The application of the corporate exception is restricted to contracts and other obligations under which the principal balance to be repaid shall originally exceed 2500 dollars.[66] The meaning of "contracts and other obligations," in light of the intent of the legislature, the wording of the statute, and prior Mississippi decisions, in all probability will be limited to loans and will not include bona fide credit sales. The Mississippi Supreme Court in the past has consistently held that bona fide credit sales transactions are not loans and thus do not come within the purview of the usury statute.[67] The intent of the legislature is to include only production loans; therefore credit sales should not be covered. Furthermore, the next phrase in the statute, "balance to be repaid," implies a transfer of capital. This view, excluding credit sales, is in accord with the position taken by the courts of most other jurisdictions.[68]

The clause, "principal balance to be repaid," eliminates one potential method of evasion of the usury statute. Were it not for this clause, a lender could ostensibly loan 2500 dollars, but through discounting of the note, the borrower might receive substantially less than that amount. In this manner the usury statute could be avoided, and loans of this size to small corporations would be unprotected by the usury statute. However, such action should not be possible under this statute, since this clause very clearly designates the principal amount to be repaid as the basis of the loan.

The last clause of the act denies the defense of usury to a corporation, its successors, guarantors, assigns or anyone on its behalf.[69] This unequivocal statement of intent should prevent extensive litigation over the availability of the defense of usury to persons in privity with the corporation. Other states with corporate exception statutes have experienced considerable controversy over this question since the typical usury statute makes no mention of the availability of the defense of usury to persons in privity with the corporations.[70]

Generally, most courts do not allow individual sureties,[71] guarantors,[72] or accommodation endorsers[73] to invoke the protection of the usury statute on corporate obligations. Some early decisions allowed persons collaterally liable to plead the usury statute as a defense on the theories that the contracts of the corporation and the guarantor were separate and should be governed by a different rule,[74] and that the statute was intended to affect only the obligation of the corporation.[75] However, as the courts began to interpret the corporate exception statutes more

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[67]*E.g.*, Yeager v. Ainsworth, 202 Miss. 747, 32 So. 2d 548 (1947).

[68]*E.g.*, Wilson v. J. E. French Co., 214 Cal. 188, 4 P.2d 537 (1931).

[69]Miss. Code Ann. § 36 (1956) as amended by Senate Bill no. 1782 (1966).

[70]*E.g.*, "No corporation shall interpose the defense of usury in any action." Md. Ann. Code art. 23, § 125 (1957).

[71]*E.g.*, Dahmes v. Industrial Credit Co., 261 Minn. 26, 110 N.W.2d 484 (1961).

[72]*E.g.*, Kings Mercantile Co. v. Cooper, 199 Misc. 381, 100 N.Y.S.2d 754 (Sup. Ct. 1950).

[73]*E.g.*, Stewart v. Bramhall, 74 N.Y. 85 (1878).

[74]Hungerford Bank v. Dodge, 30 Barb. (N.Y.) 626 (1860).

[75]Market Bank v. Smith, 16 Fed. Cas. 757 (No. 9090) (D.C. Wis. 1858).

liberally, the view that the exception acted directly on the contract itself and made it valid concerning corporations and individuals alike became generally accepted.[76]

Therefore, collaterally liable persons assume the full contract of the corporation and are denied the defense of usury.[77] The intent of the corporate exception statute to encourage commerce justifies this result. If a lender on a high-risk corporate loan could not rely on a surety for protection, he would likely be unwilling to make the loan, in effect partially defeating the purpose of the statute.

Since a trustee[78] or receiver[79] in bankruptcy has no greater rights than the corporation, both have been denied the defense of usury regarding corporate obligations unless the corporation itself could have employed the defense.[80]

A successor to a corporate obligation is generally denied the protection of the usury laws[81] since the successor takes only the rights existing under the contract. Any other view would result in the possibility of allowing the use of a "straw" successor to avoid the corporate exception statute.[82]

The defense of usury is generally extended to an individual co-obligor on a corporate note[83] on the theory that the individual co-obligor has a beneficial interest in the transaction in his own right, as opposed to a derivative interest through a corporation. Therefore the usury laws applicable to individuals should also apply to individual co-obligors.

In summary, the statute specifically applies to successors of the corporation and guarantors, and undoubtedly it also includes sureties, accommodation endorsers, and receivers and trustees in bankruptcy under the phrase "anyone on its behalf." The statute probably does not apply to an individual co-obligor, since he operates on his own behalf and not that of the corporation.

The law, in effect, raises the maximum interest rate which may be charged on corporate obligations to fifteen per cent. Presumably, if the corporation is charged more than twenty per cent for a loan, the forfeiture provision is applicable and the principal and all interest shall be forfeited.[84]

The statute provides that it shall take effect from its passage.[85] A number of cases from other jurisdictions have held that such a statute is retrospective in that the defense of usury will be denied to corporations

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[76]See, *e.g.*, Carozza v. Federal Fin. & Credit Co., 144 Md. 223, 131 Atl. 332 (1925).

[77]Winkle v. Scott, 99 F.2d 299 (8th Cir. 1938).

[78]See *In re* Kashmir Refining Co., 94 F.2d 652 (2d Cir. 1938).

[79]Houghten v. Restland Memorial Park, 343 Pa. 625, 23 A.2d 497 (1942).

[80]Merchants & Mfrs. Sec. Co. v. Johnson, 69 F.2d 940 (8th Cir. 1934).

[81]*E.g.*, Miller v. Reid, 243 Mich. 694, 220 N.W. 748 (1928).

[82]Comment, *Usury Laws and the Corporate Exception*, 23 MD. L. REV. 51, 58 (1963).

[83]*E.g.*, Astra Pictures Inc. v. Shapiro, 182 Misc. 19, 48 N.Y.S.2d 858 (Sup. Ct. 1944).

[84]MISS. CODE ANN. § 36 (1956) as amended by Senate Bill no. 1782 (1966).

[85]*Ibid.*

on notes made before the enactment of the law.[86] This conclusion is logical for it only grants legal status to the voluntary transaction of the parties and thus the intent of the statute is effected by this interpretation.

VI. Effects of the Statute

The practical effects of the amendment should include an increase in the flow of commerce within the state and a lessening of the difficulties of business expansion. Financing for worthwhile business ventures should be available without the expense and inconvenience of seeking out-of-state capital. Banks and other lending institutions will find it possible to provide a more flexible and expanded credit program. The improvement of the business climate resulting from the removal of the artifical restrictions on business enterprise should provide a boost for Mississippi's program to attract new industry, and the state will be helped toward the achievement of a better balanced economy.

The possibility of damaging economic and social side effects is minimized by the safeguards written into the statute and by the expressed intent of the legislature. A suggested improvement in the law is the inclusion of an unambiguous clause providing that the corporate exception shall not be used in any manner, including the use of a sham corporation, to evade the regulation of any other usury law. However, the phrase "organized for profit" combined with the legislative intent to apply the exception only to production loans should be interpreted by a court that "looks through the form to the substance of a transaction" in a manner to insure that the usury laws of the state will not be evaded.

Overall, the statute provides perhaps the most comprehensive treatment of the corporate exception problem of any statute in the United States and exhibits a perception and insight often lacking in legislative enactments. Combined with the Small Loan Regulatory Act,[87] the usury statute,[88] and other regulatory provisions,[89] the corporate exception should insure that usury in Mississippi will constitute much less of a problem in years to come.

Raymond Mize Conner

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[86] *E.g.*, Curtis v. Leavitt, 15 N.Y. 9 (1857).

[87] Miss. Code Ann. §§ 5591-01 to -54 (Supp. 1966).

[88] Miss. Code Ann. § 36 (1956) as amended by Senate Bill no 1782 (1966).

[89] *E.g.*, Personal Property Loans Act, Miss. Code Ann. §§ 5571-91 (1956); Motor Vehicle Sales Finance Act, Miss. Code Ann. §§ 8075-01 to -24 (Supp. 1966).

RECENT BOOKS

RECOVERY FOR WRONGFUL DEATH. Stuart M. Speiser. Rochester, New York: Lawyer's Cooperative; Bancroft Whitney, 1966. Pp. 1094. $28.50.

This is a comprehensive treatise on the right of recovery for wrongful death in every jurisdiction in the United States. Mr. Speiser gives the history of the action for wrongful death at common law and the history of legislation creating a remedy for wrongful death, commencing with the enactment of Lord Campbell's Act of 1846, 9 & 10 Vict., c. 83. This act served as a model for the statutes adopted in every American state granting a remedy for wrongful death. This book not only has an historical interest, but the author has made it a valuable book for the practicing attorney by including appendices giving the text of the wrongful death statutes of each state, a condensation of the statutory provisions, life expectancy tables, and a check list of damage information for wrongful death actions.

The author discusses the holding in the case of *Baker v. Bolton*, 1 Campbell 493, 170 English reprint 1033, decided at Nisi Prius in 1808 wherein there was dicta to the effect that "in a civil court, the death of a human being could not be complained of as an injury." This proposition became the basis for the common law rule adopted by nearly all subsequent cases. As pointed out by the author, it is clear that the rule in *Baker v. Bolton* was not based on precedent or logic. After some hesitation the ilogic of *Baker v. Bolton* was adopted by the American courts. The rationalizations advanced by the courts for their refusal to recognize any cause of action for wrongful death were: (1) it is inconsistent with the policy of the law to permit the value of human life to become the subject of judicial computation or, (2) that the recognition of an action for wrongful death would result in "numberless actions" for damage of an "awful magnitude" or (3) that "to the cultivated and enlightened mind, looking at human life in the light of the Christian religion as sacred, the idea of compensating its loss in money is revolting," or (4) that the impossibility of calculating the pecuniary value of a life is a sufficient reason for denying recovery in wrongful death actions. These rationalizations were obviously based on poor logic and worse reasoning, and it is not surprising that the rule of *Baker v. Bolton* was subjected to considerable criticism. Then with the passage of Lord Campbell's Act in 1848 in England, the American states promptly followed suit with similar acts giving a cause of action to the survivors for wrongful death.

The question of whether a common law action for wrongful death exists along with the statutory right of action granted by Lord Campbell's Act and similar statutes, has a practical as well as historical value. For instance, in states whose wrongful death statute places a limit upon the amount of recovery, as do a number of the states, it would be to the advantage of the plaintiffs to pursue the common law cause of action for there would be no limit upon the amount of the recovery. This was attempted in Illinois without success, but in view of the enlight-

ened rulings of most modern courts it is not inconceivable that some courts will eventually hold that the common law right of action for wrongful death exists along with the statutory right of action.

Having the applicable law of all states available in one volume is very useful to the practitioner because of the many accidents in which the law of two or more states may come into play. In particular the attorney representing the plaintiffs in a wrongful death action where the court of more than one state may have jurisdiction will need to review the wrongful death statutes of each state in question. Considering the importance of actions for wrongful death, the possibility of large recoveries therein, the large number of such cases which have come before the courts and the prospect of an even greater number in the future, this volume is well worth its cost.

Jason H. Floyd
Attorney at Law
Gulfport, Mississippi

Book Notes

LAWYERS DESK REFERENCE 1966/1967. Dean A. Robb and Harry M. Philo. Rochester, New York: The Lawyers Co-Operative Publishing Co., 1966. Pp. 835. $20.00.

This book is a compilation of references to experts or expert treatises of value in tort law. Its compilation includes safety organizations, publications, libraries, films, standards and codes as well as names of expert witnesses and manufacturers of safety equipment. Sources and procedure in the investigation of automotive, industrial, railroad and admiralty cases are set out in detail.

Books Received

FIFTEENTH ANNUAL TULANE TAX INSTITUTE. Sponsored by the School of Law and School of Business Administration, Tulane University. New York, New York: The Journal of Taxation, Inc., 1965. Pp. 836. $17.50.

JEFFREYS—A NEW PORTRAIT OF ENGLAND'S "HANGING JUDGE." P. J. Helm. New York, New York: Thomas Y. Crowell Co., 1966. Pp. 205. $5.95.

LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT. Michael I. Sovern. New York, New York: The Twentieth Century Fund, 1966. Pp. 270. $6.00.

THE WARREN REVOLUTION. L. Brent Bozell. New Rochelle, New York: Arlington House, 1966. Pp. 365. $7.00.

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